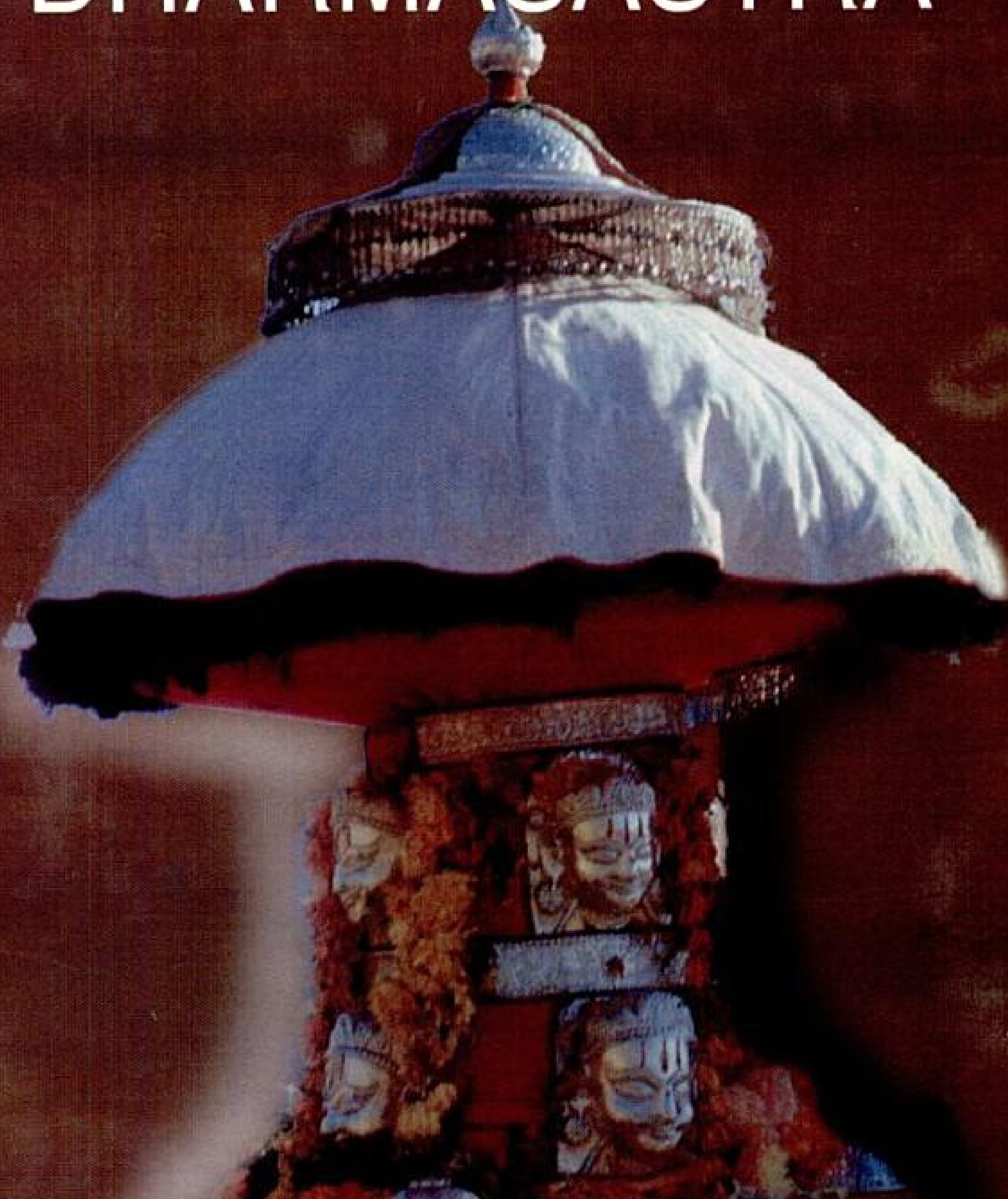
ENCYCLOPAEDIC
DICTIONARY OF THE

DHARMAŚĀSTRA



VOLUME

3

SWAMI PARMESHWARANAND

The Encyclopaedic dictionary of the Dharmasatras is a thematic collection and compilation of all important aspects of the *Dharmasastras* which play very important role in development of Indian religio-philosophical and legal tradition. If there is one mass of scriptures that has inspired and sustained the Hindus over the millennia, it is the *Dharmasatras* which has created, strengthened and preserved our great tradition of spirituality. This it has done, not only by a fearless spirit of inquiry to its logical conclusions, but also by intuitive mystical experiences beyond the ken of the intellect. No school of thought, no religious movement of the subsequent periods in Indian history has remained untouched by their influence if not pervaded by them.

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Preface

The Enclyclopaedic Dictionary of *The Dharmasastras* is a compilation of comprehensive and informative source of informations about the 300 terms and terminology religious, social and political of Hindu codes of law and duty in three volumes. *Dharmasastra* (Treatises on law and duty) are the fundamental texts of the scriptural category of *smriti,* indeed for some (such as *Vijnaneshvara* and *Yajnavalkya-Smriti)* the only ones. The most prestigious and widely authoritative is that of the first man, Manu; but the genre is here represented by what is the next most prestigious, and perhaps more often actually followed authority, the *Yajnavalkya-Smriti* which covers rules about impurity, acceptable infringements of rules during times of emergency, and rules for forest ascetics *(vanaprastha)* (who still maintain sacrificial fires) and for renunciates who have internalised the fires *(yati* or *sannyasin).*

It seemed preferable to give large, unbroken, coherent units of text from the first and third sections of the less prestigious *Yajnavalkya-Smriti* than to attempt to anthologise the *Manusmriti,* the law book of Manu, in which the themes here represented are often more diffusely treated and scattered through the work.

I am thankful to all those scholars for their intellectual as well as moral support in compilation of this work.

N

The Nauya-Nyāya school

The old school of Logic did not concern itself with Property so far as is known. It was assumed to be a *guṇa* of a thing: it was a characteristic of a thing that it was fit to be employed at pleasure (or at will) by a person—and thus categorised it ceased, until Raghunātha's time, to be a problem. However, the atomic theory of the logicians raised the not unconnected question how a thing qhich had changed its guṇas so as to change its very character could still have the characteristic of being its previous Owner's property? According to the Mimāṃsā outlook change in the character of the thing would not be so catastrophic as change in the character of the person in whose mind the *saṃskāra* existed. From the *nyāya* standpoint, however, property was a quality of the thing itself, and if the thing changed did not the Property change with it? See mext note. What would cause curds, for example, to be characterized by the Property of X, when the milk, out of which they had formed, had been given to X by Y? If the characteristic of being fit for disposition at will by X began to inhere in the milk at the time of the gift, when did it leave, if ever, and when did that same characteristic begin to inhere in the curds? A similar problem arose when clay was handed to a potter. At what moment, and how, did X, former Owner of the clay, begin to be the Owner of the pot made from it? The atomic theory was welcomed for its ability to cope with this difficulty. The property inhered in the atoms which made up the milk and the clay, and since they were indestructible (though capable of rearrangement) their former Owner continued to own them though they had begun to comprise a new entity in each case. The baginnings of this discussion are clearly visible in the *Nyāya-sūtra* of Gotama called Akṣapāda, and the question continued to interest logicians until the 17th century at the earieast). Jayarāma, *svatvavādārtha*, denies this solution: property in the changed article arises out of the Property in the article before its chage, like that in crops from that in the land. This gives more weight to legal usage, as is proper. Viśvanātha Suddhāntapañcānana, *Padārtha-tattvāloka*, fo. 166a-b, denies the lapse of time theory, using the problem to defeat the idea

that Property is *vilakṣana-jñānarūpa* (see below, p. 125), "a form of particularised knowledge". Property contines to exist though no knowledge of the change has occurred, and the old knowledge persists. Jagannātha, trans. II, 187, allowed that Ownership must change as the thing changes (but this is the final result of developments mentioned at p. 123 below).

The New Logic was characterised by extreme objectivity, a subtle and exact mode of expression, and a willingness to investigate facts with the minimum dependence upon ancient technical authorities. The usefulness of the investigation of Property is at once apparent when we find the logicians prepared to take seriously a *śāstra* other that their own, to test their hypotheses with reference to legal propositions, to examine these latter as if they were lawyers, and to treat actual practice as well as legal theory as their guides. The prestige which logic obtained in Nava-dvîpa (or Nadiya, Nuddea) in Bengal had the result that by the 18th century professors of law held for the most part degrees in logic, and their vocabulary and methods of expression, not to speak of their professional expertise in matters of judicature (about which we must proceed largely upon conjecture), owed much to this new queen of studies.

Logicians did not in fact have time to investigate many topics of law. That of *svatva*, as we shall see, was so heavy an assignment, that it left little leisure for other excursions into the alien *śāstra*. But remains of a treatise on the nature of Marriage have been found, and the fragments show what an interesting effect a shaft of logical light could produce when cast into that involved institution which is the foundation of so much of every system of law. Curiously similarly with the Sv. Rah., the work in question bears the two titles Vivāhā-vāda and Vivaha-vada-rahasyam. Two copies existed in 1927 but their present whereabouts have yet to be discovered. No. 339 seems to be complete. The definition of Marriage given is *carama-saṃskārānukula-vyāpāro vivāhaḥ*, "marriage is a transaction conformable to (or favourable to) the final *saṃskāra*". At first sight this highly eccentric definition seems incredibly objectivised; but it is the result, doubtless, of rejecting all other possible definitions, including, it seems, any reference to "taking", or any participation involving "knowledge" (for child-marriages dispense with knowledge on the part of the parties). But the rediscovery of the manuscripts is awaited with impatience. It is much to be regretted that so little logical work of this character survives, and that the teaching of the great logicians is to be appreciated for the most part only through the work of their pupils, the lawyers who (as we have seen, were in any case bound to follow Mimāṃsā doctrines wherever possible.

O

OATHS AND ORDEALS IN DHARMAŚĀTRA WORKS

The Oaths and ordeals are the divine means of proof discussed under the law of evidence by the Dh.writers, the ancient law-givers of India. The are the methods of investigating the truth according to which the accused person is asked to undergo some trial in which conditions favouable or unfavourable, supposed to be the dictates of god, decide the innocence or the guilt of the person. The Dh. writers have made a thorough investigation of all the aspects of the method which was practised by the ancient people. They recognized the merits of the method and channelised it into a definite system by ordaining detailed rules for its application and definite forms or modes of its execution, so as to make it work as an efficient legal instrument.

The Dharmaśāstra commanded a very influence on the minds of the people and the conditions of the society. The people lived the principles laid down in these works and followed its rules with all the minutest details. Ordeal was a living institution in India. It was found practised through all the centuries of the Indian history. Hostorical records reveal to us that the people of India practised these ordeals as they were detailed in the Dh.works. The customs of the various tribes of India also show that they preserved the Dh.ordeals intact since they tally with the minutest detail given in the Dh.works. The study of ordeal thus becomes an interesting sociological study of the Indian people-investigating the method into its theory and practice.

There is a lot of criticism against the practice of ordeal. The method appears to be irrational and barbarous to the modern mind. It is however universal, found in almost all the countries of the world. Some of the European scholars of the nineteenth century however tried to show that it mainly belonged to the undeveloped people of the world. A.Dubois who believed ordeal which as 'common enough in almost all ancient heathen nations' to be the 'degrading example' of the 'foolish beliefs of which human mind was capable of' and observed that ' it was in existence in most Christian countries till 13th

century', pointed out that ' trial by ordeal was one of the principal features of Hindu Jurisprudence'. 'One or two ethnological points', say AE Crawley, 'may be noted with regards to these ordeals. At no time did Roman law have anything to do with the ordeals. Greeks knew it in its Aryan forms, but here also law ignored it. The Chinese and American Indians similarly refused to develop the system. It is forbidden in Quran. The great spheres of prevalence of ordeal are Indian, African and Teutonic peoples.

In the following pages, an attempt is made to analyse and study the ordeals discussed in the Dh.works in all their aspects and try to evaluate the Indian ordeals as such.

The law of every country is the outcome and the result of the economic and social conditions of that country as well as the expression of its intellectual capacity for dealing with these conditions. The relevant intellectual ideas include ideas in respect of the relation of man to god and of man to man and as to the aim and purpose of life on earth. It is therefore preferable for us to go first through the subject and scope of the Dharmaśāstra works in which ordeals happens to be a topic for discussion.

Subject and Scope of the Dh.Lifeterature :

(1) Meaning of Dharma :

Dharma is one of those Sanskrit words which cannot be easily rendered into Engligh or any other language. Even if we go through the literal or the dictionary meanings of the word, they would be many. The word Dharma can thus mean ordinance, usage, duty, right, justice, morality, virtue, religion, good works etc. Dharma is also personified as deity. (Dharma is the presiding deity of the all the ordeals described in Dharmaśāstra. God Dharma is invoked and adored in these trials and is asked to declare the trust regarding the dispute for which the person is asked to undergo the ordeal).

The word Dharma is derived from √Dhṛ (to uphold, to support, to nourish) and in a few cases in the RV we find that the word is used in its derivative sense i.e. upholder or sustainer (e.g. RV I.187.1, X.92.2, etc.) but in most of the other cases, it has come to mean a religions ordinance or fixed principles or rules of couduct. In AV XI.7.17, it seems to be used in the sense of 'merit acquired by the performance of religious rite'. In Ait.Br. (VII.17) it seems to be used in an abstract sense i.e. 'the whole body of religious rites'. The Bṛhadāranyaka Up. (I.14.14) treats Dharma and Satya as equivalent. In the Chāndogya Up. (II.23) it is pointed out that ' there are three branches of Dharma — one is (constituted by) sacrifice, study and charity(i.e. the stage of the householders), the second is (constituted by) austerities (i.e. the stage of being a hermit) and the third is the Brahmacārin's dwelling in the house of his teacher—all these attain to the world of meritorious men and who firmly abide in Brahman attains immortality". It will be seen that in this passage the word Dharma stands for particular duties of the Āśramas.

The word Dharma has thus passed through several transitions of meanings. Its most prominent significance gradually came to be ' the privileges, duties and obligation of a

man his standard of conduct as a member of the Aryan community, as a member of one of the castes, as a person in a particular stage of life. The word is employed in this sense in the Dh.works.

(2) Sources of Dharma

Veda is the source of Dharma and the tradition and practice of those that know it. ' says Gautama. ' The authority (for the Dharma) is the consensus of those that know Dharma and the Vedas', points out Āpastamba. Manusmṛti lays down five different sources of Dharma i.e. the Veda, the tradition and practice of those that know it, usages of the various men and self-satisfaction. Yājñavalkya declares that the Veda, traditional lore, usage of good men, what is agreeable to one's self and desire born of deliberation —these are known to be the sources of Dharma.

It will thus appear that Veda, Smṛti and Sadācāra (custom) are considered to be the principal sources of Dharma. We find many Vedic passages that shed a flood of light on marriage, forms of marriage, kinds of sons, partition, inheritance and so on. It will appear however that the Vedas do not contain positive precepts on matters of Dharma in a connected form but contain incidental references to various topics that come for regular discussion in the Dh.works. It can be therefore said that the rules contained in the Dharmasūtras and other Dh.works had their roots deep down in most ancient Vedic tradition and the authors of Dharmaśāstra were quite justified in looking upto Vedas as a source of Dharma. *Smṛti* is a general term which can be applied to all orthodox non-vedic works such as Pāṇini's grammer, Srauta, Gṛhya and Dharma sūtras, Mahābhārata and other works. In its narrow sense however it is identified with the Dharmaśāstra and means the Smṛtis of Dharmaśāstra. Smṛtis mirrored the beliefs and practices of people and soon commanded authoritative position so that they were regarded the source of Dharma. Recognition of the authority of smriti was itself an important step forward in the development of Hindu law. Smṛtis imply human authorship and thus introduced human agency in declaration of the law. Hindu jurists attach great importance to sadācāra or the custom of the people and accept it as the source of law.

(3) The Hindu Judicial System

For a correct understanding of the Hindu Judicial System, it is necessary to take note of social condition and sociological theories of ancient India, its political philosophy and its religion and religious philosophy.

The RV life was pastoral, agricultural and therefore rural as distinguished from the porsons commercially occupied together in cities. This circumstance determined that the course of social and political life in India must be different from the city states of Greece and Rome. From the earliest times, life in India has been so organized on the basis of autonomous village that the village institutions were not only recognized by the later

Dharmaśāstras but were strong enough to defy and survive all the political vicissitudes of the country till the recent times.

Hindu sociologists believed in what may be called the organic theory of society. Each section of the community has its allotted place and function and each was as important as the rest for the achievement of the common welfare.

The king was as much subject to the law as any other citizen. He could not make or alter law. Neither the Republics nor the monarchies nor even the empires developed a strong and comprehensive central administration and this accounts for the permanence of the popular element in the Hindu judicial system.

Admixture of religion and ethics is to be found in all ancient systems. In Hindu law this circumstance was the result of a definits philosophy. The judicial system of Hindus cannot be correctly understood without a proper appreciation of the Hindu theory of Dharma.

King's Justice

Definite history of the evolution of law proper starts in India with the emergence and growth of king as a judge. In the earliest stage of the ancient Indian society, administration of justice was the function of the social groups of kulas and guilds, but already in the earliest Dharmasūtras we find that the administration of justice was firmly eatablished as an important function of the king. The judicial authority of the king is not founded on any fiction of his divine personality but upon positive law and has its ultimate historical basis in his function as a military chief. He is looked upon as the upholder of the social and moral order. For the purpose of maintaining Dharma he is endowed with the power of Daṇḍa.

As it has been referred above, ancient Aryans did not consider king as the source of law. Law had come down from Veda, Smṛti, and Sadācāra. Law was what had come down from past ages from the sages who had specialised in its study. The duty of the king was to maintain and uphold that law. The power and prestige of king no doubt appears to have grown with times, but the essence of Arya laws from vedic times was that the king should place himself under the guidance of the sages.

When the King's authority and duty to administer justice was firmly established as we find already in Dharmasūtras, we find it laid down immediately that he has to ascertain the law from earned men and from kulas and guilds. Later law-givers give him authority to give directions to local guilt organisation and he is empowered to make it obligatory on his subjects to follow Rājakṛta laws.

As the judicial function of the king grew, we find two-fold developments: (i) obligation of king to know the law from competent authorities; (ii) the judicial authority of the king came to be delegated to permanent judges. We find king's courts developed.

One result of the enlargement of the administration of justice of king's court was that the law became more and more systematic and its study and practice went into the hands of practical lawyers who specialized it. In their hands the corpus juri of ancient India received enormous development to keep pace with the progress of time and went more and more in minutest details.

The legal procedure in ancient India is a fine illustration of the kind are development that the law had in the hands of practical jurists. The judicial procedure fills little space in early works, the Dharmasūtras. Earlier works treat meagre the procedure law as a part of substantive law. There must have been some usages and practices which were habitually resorted to in the king's court with their being recorded in the laws. But the absence of such rules in laws books certainly shows that such practices had not hardened to concrete rule at any rate assumed sufficient importance to be recorded in the texts of law.

Ordeal in Dharmaśāstra can be studies and better appreciated only in context of the general features of the Hindu Judicial System.

(4) Scope of Dharmāsāstra

The sources of *Dharmāsāstra* discussed above make it clear that the Dh.literature is based on the old vedic traditon. The earliest of the Dh.works,the Dharmasūtras form themselves a part of the kalpasutras. The word kalpa (or rather kalpasūtra) is used in two senses, one comprehensive including the aphoristics literature on vedic rituals, on domestic ceremonies and also on law, government and adminstration of justice, the other sense covers only those aphoristic works that deal with the vedic sacrifices and matters concerning with them. If the first sense is taken, then kalpasūtras are classified into three classes i.e. (i) Srautasūtras that deal solemnly with the vedic sacrifices, (ii) Gṛhyasūtras that deal with the domestic ceremonies such as Upanayana, Marriage and with daily and periodical rites and employ Mantras for them mostly from one sakha of the veda. (iii) Dharmasūtras (also depending upon the vedas as the highest authority) that treat of some of the topics dealt with in Gṛhyasūtras but add provisions of matters concerning economic life, politics, government, civil and criminal law. It will appear that the Dharmasūtras are closely connected with the Gṛhyasūtras in subjects and topics, but the Dharmasūtras very rarely describe the rutual of domestic life (which is detailed in the Gṛhyasūtras). They merely touch upon it. Their scope is wider and more ambitious, their principal purpose is to dilate upon the rules of conduct, law and custom.

The Dharmasūtras are followed by the Smṛtis. There are certain points which distinguish Dharmasūtras from the Smṛtis, e.g. (i) Many Dharmasūtras are either parts of the Kalpa belonging to each Sūtracarana or are intimately connected with the Gṛhyasūtras. (ii) The authors of Dharmasūtras do not claim to be inspired seers or superhuman beings, while the Smṛtis such as those of Manu and Yājñavalkya are ascribed to gods like Brahmā. (iii) The Dharmasūtras are in prose or in mixed prose and verse, the Smṛtis are in verse. (iv)

The language of Dharmasūtras is generally more archaic than that of the Smṛtis. (v) The Dharmasutras do not proceed upon an orderly arrangement of topics which the Smṛtis arrange their and treat the subjects under three principal heads viz. Acāra, Vyavahāra and Prāyaścitta.

Subjects comming under Dharmaśātras covered a very wide range. It touched all the aspects of human life. Dharma as we have seen above is not only a religious or an ethical concept but a sociological concept also, which concerns with the human life-concerning with an individual in his personal capacity or in his relation with the society or the government.

(5) The Four Sāstras

Aims of human life according to the Indian tradition can be classified into four aspects i.e. Dharma. Artha, Kāma and Mokṣa and accordingly we find four Śastras— the Dharmaśāstra, Arthaśāstra. Kāmaśāstra and the Mokṣaśāstra. But, we have to remember that the Indian philosophy teaches the integration of the four aspects, (The Mahābhārata claims that Vyāsa composed the work as a great Dharmaśāstra, Arthaśāstra, Kāmaśāstra and the Mokṣaśāstra (Ādiparva II.83) and as far as the activities of man in this world are concerened, we know that the Dharma is the ruling aspect which should control and guide the Artha and Kāma aspects. The point to be stressed here is that these Sāstras may be individually taken as distinct since each of them discussed a different point of view, essentially however, they are based on the principle of integration and should therefore be taken as mutually complementary and not contradictory. One must not suppose of any rivalry amongst these Sāstras.

Let us take the example of the Dharmaśāstra and the Arthaśāstra. Arthaśāstra essentially deals with the Rājadharma but these topics are dealt with by the Dharmasūstra and the Smrtis. (Vide Gautama X-XII, Manu VII-VIII. Yaj.I.309-68,II1-307 etc.). Dharmaśāstra deals with all aspects of society and therefore, it deals with the Rājadharma. Arthaśāstra includes politics, economics, law and justice. Two chapters in the Arthaśāstra-Dharmasthiya and Kaṇṭakaśodhana—deal with the judical administration.

(6) Dr. K.P. Jayaswal's Theory regarding the Dharma and the Artha laws :

In his 'Manu and Yājñavalkya Dr. K.P. Jayaswal has put forth a theory that before Manu secular law must have been developed in the schools of politicians and statesmen and therefore delt with only in Arthasastra, that the Dharmaśāstra did not make secular law as their proper subject and that Manusmṛti was the first Dharma work to invade the province of law proper. The object of this invasion was to recast the law on the lines accepted to Brahmins taking advantage of the opportunity offered by Sungas.

He puts his theory as follows : The jurisdiction of Dharma and Artha laws was formerly separate. This is corroborated by Dharmaśāstra literature, Āpastamba say. Raja

purohitam dhamarthakusalam (II.10.15)... When the Dharma laws joint hands with the Artha laws, the former had to suggest certain principles of Dharma school e.g. Āspatamba adds, Na ca sandehe daṇḍam kuryat (II.11.2) or ' Suvictam vicityā daivapraśnebhyo rājā daṇḍaya Pratipadyeta (II.11.3). That none should be punished in case of doubt is an equitable doctrine of Dharma school which would have probably founded approval in Artha school, but Artha laws never allowed ordeals in their proofs. They are not allowed in Kautilya's Arthaśāstra laws. They have not been shown even the curtsey of being discussed and them rejected. After the Brahmin political and social revival under Suṅgas and Kāṅvas, the cause of ordeals was vigorously advocated. A centrury or two later, a political revolution is dramatized as the result of the courts not allowing the ordeal trial to Brahmin accused in a murder case. The Dharma school which dealt with the matters divine advocated that divine mode of proof even in the law court and they coaxed the king with the promise of the other world......

'The Arthaśāstra laws never recognized the use of ordeals in Vyavahāra or trial at law. It was however a mode of proof or disproof in trials at Dharma. It has been so far age. Āpastamba advised the king to employ it is Dharma trials in doubtful cases (II.29.6). Manu is at paints to show why ordeals should be recognized. He cites old cases from Vedic literature that ordeals has been gone through. Now as Vyavahāra was made a handmaid of Dharma, ordeals was imposed on laws. True, it was confined to the old Prāyascitta cases, cases of heinous sins and was limited in employment to cases where no proof was available. Yet, it became a recognized institution. Not a line, not a word, in controversy or otherwise is mentioned about the proof by ordeal in Arthaśāstra, and all the works of the tradition of Arthaśāstra discourage it. Narada discourages it and Sukaniti points out very limited utility. That the Arthaśāstra could not recognise it stands to reason. The Arthasastra school held that law was a human creation, a creation of society, of thinkers as asserted by Sukranti in clearest accents.'

On pp. 137 and 138 of his book, Dr. Jayaswal investigates a details comparison of the arrangement of the topics in the Dharmasthiya chapter of the Arthaśāstra with the topics coming in the VIII chapter of the Manusmṛti and points out how Manu has purposely brought in oath at a particular point which can obviously be seen as an interpolation or a foreign discussion in the whole body of discussion undertaken.

It is not possible to accept Dr. jayaswal's theory for various reasons. (i) we have already pointed out that these Sastras should be taken as complementary and not contradictory to one another. The Manusmṛti insists on Dharma as the principal matter and calls upon all to give up Artha and Kama that are opposed to Dharma (Manu IV.176), on the other hand Arthaśāstra emphatically states that 'Artha alone is supreme, for Dharma and Kāma depend upon Artha' (1.7.6-7). Thus though Manusmṛti and Arthaśāstra deal with many matters that are common to both, the principals and emphasis are different and that is why they are considered different. In fact, they should be taken as parallel. (ii) The main purpose and province of the Arthaśāstra is to set out the functions of the stat and deal with the administration of its various organs and it is in this relation

that it offers two chapters (of Dharmasthīya and Kaṇṭakaśōdhana) on the administration of justice. It must be remembered that Arthaśāstra is not essentially a work on law and judiciary. On the contrary, we find that topics of law and administration of justice are discussed in old Dharmasūtras, and are found developed into an important section of the later Dh.literature. Law or the judicial system is thus principally developed in Dharmaśāstra. It becomes the regular subject of the Dh.works. (iii) Dr. Jayaswal speaks of Manus invasion of Dharmaśāstra material on the secular law of Arthaśāstra. Hd gives the case-example of ordeal which according to him is typically a Dharmaśāstra material interpolated or invaded into the secular law of Arthaśāstra. It must be pointed out here that Kautiliya is the oldest extent work on Arthaśāstra. None of the earlier Arthaśāstra work is now available. It will be therefore nothing more than a guess to assume that topics of secular law must have been fully dealt with in them. Moreover, it is not proper to believe that the Dh.writers were opposed to the secular law or the law of reason as Dr.Jayaswal puts it, because we know that the Dh.writers accept the superiority of Vyavahāra over Darma.

There may be material difference between Manusmṛti and Arthaśāstra, but this itself will not help to establish Dr. Jayaswal's theory. Though Arthaśāstra and Dharmaśāstra are contra-distinguished on account of the differences in the two śāstras in ideals and in methods adopted to reach them. Arthaśāstra is really a branch of Dharmaśāstra as the former deals with the responsibilities of kings for whom rules are laid down in many treatises on Dharma. (iv) Dharmaśāstra discussed ordeal while Arthasastra does not. Dr. Jayaswal points it out as Dh.topic. Is it the only topic discussed in this śāstra? Dharmaśāstra has a broader base. Take Ācāre, Vyavahāra and Prāyaścitta—the three important sections of the Dharmaśāstra, that will provide a general answer to the question of the place of law in human life. Dharmaśāstra discusses law in all its aspects. It will point out what is law or what it should be,what are its sources, its procedure, various titles of law or and so on. Dharmaśāstra discusses various kinds of proofs and ordeal is one of them. And how does ordeal come into Dharmaśāstra ? Law is derived from the customs of the people, and Dharmaśāstra accepted ordeal because it was the deep-rooted custom of the people.

The Arthaśāstra scheme of courts is different from that of Manu. The Arthaśāstra does not seem to attach much importance to the various popular tribunals. It provided for administration of justice by king's court appointed in a Samgrahana (a group up of ten villages), dronamukh (group of villages) and Sthāniya (group of 800 villages) and the places where the districts met, the courts were to consist of three Dharmastas and three Amātyas. The Manusmṛti and following it, the Smṛtis of Yājñavalkya, Nārada, Bṛhaspati and Kātyāyana continue the Sabhā system which seems to be in vogue from Vedic times. The Sabhā system brought popular element in the Hindu judicial system. The Dh.writer attach importance to the customs of the people. They accepted ordeal on merits. This made law nearer to the people. (v) Division of Dharma and Artha law propounded by Dr. Jayaswal is an improbability. It is remarkable that in all the legal systems of the world,

law in its initial stage is mixed with religion. 'the legal activities of every civilized people show a movement through three stages of development—divinatory, formalistic and intellectual. In order to operate effectively and to accomplish their mission, all the three stages must be supported by the belief that the law is of divine origin and of higher power realized in a worldly existence and that it is not a human product to be mastered by will'—observes Heusler. 'the Hindu judicial system unifies happily the ideals and realities of life in developing its law and the administration of justice.

It must be observed that Kauṭilya himself accepts the importance of Dharma and therefore there is no point in distinguishing the two śāstras with a sense of rivalry and condemning one because it recommends ordeal and show the superiority of the other because it does not.

Thus, after taking a general review of the subject and scope of the Dharmaśāstra literature and of the Hindu judicial system as such and reviewing the views of Dr. K.P. Jayaswal with regards to the Dharma and Artha laws and the recommendation of the ordeal by the former, we shall now see in chronological order how ordeal is discussed and developed by the various Dh.writers. In this discussion we have accepted the chronological positions of these writers as decided by Dr. P.V. Kane in his History of Dharmaśāstra (Vol.1).

The literature on Dharmaśāstra falls into three well-known but somewhat overlapping periods. (i) The first period is that of Dharmasūtra and Manusmṛti. It is a period dating from at least 6th century B.C. to the beginning of the Christian era. (ii) Next comes the period when most of the versified Smṛtis were composed and it ranges from the first centuries of the Christian era to about 800 A.D. (iii) The third period is that of commentators and the writers of digests. This period covers over a thousand years from about 7th century to 1800 A.D.

We must point out here an essential difference between the works produced in the first two periods and those in the last one. The works produced in the first two periods provide original texts of the sages while the main job of the works produced in the third period is to explain these texts. We shall therefore take here (i) and (ii) in one group and discuss them first and then review the works of the third period.

There are certain difficulties which a student of Dharmaśāstra has to face in deciding the texts or knowing the exact views of the various Smṛtikaras. These may be pointed out here in general.

(i) The *Smṛtis* are the products of different and widely separated ages. Sometimes we find a locuna in the information available. The extant works are not able to fill in the gap. E.g. Manu refers to only two ordeals while Viṣṇu and Yāj, give us the list of five ordeals, source of which is not known to us. Nārada and Kātyāyana lead us to belief that they were probably in possession of a larger version of the Manusmṛti in which ordeals were treated with more details, but this work is not available to us.

(ii) Some of the works are known only through quotations. The original texts of these writers are not available and we have to depend upon reconstructed Smṛtis. Pitāmaha, for example, is a very important writer on ordeal. He has given the most elaborate treatment of the ordeal but is known only from quotations.

(iii) Sometimes we find the same verses ascribed to different authors in different works. There are many verses on ordeals which are commonly ascribed to Nār.Bṛ, Bṛ-Pit and so on.

Inspite of the difficulties pointed above, it is possible to see that the ordeal is developed harmoniously into a definite system by the Dh.writers. It will therefore be advantageous for us to see in chronological order how ordeal is discussed and developed by the various writers.

It is rather interesting to note that the earlier writers give very scanty information above ordeal, while it is discussed with more details in the later works. "Ordeals are antique institutions and mostly come under custom. One would therefore expect them to be stated fully in early Smṛtis and to be neglected in those which were composed in epochs and environments that discouraged resort to them. 'It is just the other way'. Observes Mr. K.V. Rangaswami Aiyanager who concludes that 'the application of the usual generalization of chronological position being indicated by the fullness of treatment will conspicuously fail in this instance". In course of our discussion we shall see below the reasons why we get more details about ordeals in the later works. We shall firstly see the development of the ordeal in each of these works individually.

(1) Gautamadharmasūtra : This is the oldest Dharmasūtra available to us. It cannot be placed later than the period between 600 B.C. to 400 B.C. Chapters 11 to 13 discuss the topics of Rājadharma and the administration of justice. Gautama recognizes witnesses as the proof for establishing truth in legal disputes. He quotes the opinion of 'some' according to whom oath can be used for the establishment of the truth. Oath should be conducted in the vicinity of gods or in the Brahminical or Royal assemblies. It should not be conducted to a Brahmin. The Sarasvatīvilāsa quotes a Sūtra of Gautam according to which the Phāla ordeal should be conducted to a Sūdra. The Sūtra is not available in the printed Gautamadharmasutra and obviously appears to be of late orgin.

(2) Āpastambadharmasūtra : Āp.Dh.Sū.is written in a more concise and compact style. Āpastamba advises the king to use ordeal in the cases of doubt. Though chronologically Apastamba comes later than Gautama (Apastamba can be placed between 400 B.C. to 350 B.C.). law of evidence known through this work speaks of earlier state of affairs. Gautam gives more details about ordeal than Apastamba.

(3) The Dharmasūtra of Śaṅkha and Likhita : The Dharmasūrta of Sankha and Likhita is ancient one. It is very largely, if not entirely, in prose. From the quotations available in Nibandhas, it appears to have closely resembled the other extant Sūtras on Dharma in style and contents. The Sūtra discussed four of the five famous ordeals discussed by Viṣṇu and Yāj, and the other forms. It is remarkable that the names or the titles of the

ordeals enumerated by them are slightly different from those of the other writers. The names also explain the essential form in which the ordeals are conducted. Thus instead of Tulā, Agni, Jala and Viṣa of the other writers, the authors prefer to name these ordeals as Tulārohaṇam, Lahadhāraṇam, Apsu Pravaśaḥ and Viṣāśanam.

(4) Manusmṛti : Manusmṛti should be taken with the older Dharmsūtras of Gautama and Āpastamba as far as its treatment of ordeal is concerned. Manu refers to the ordeal as a custom practised from ancient times, points out its utility in the disputes which have no proofs and mentions three methods of trails (i.e. Fire, Water and Touching the head of Son or Wife).

This is not the place to discuss various problems regarding the authorship or the text of the Manusmṛti as it has come down to us. It however appears that Nārada and Kātyāyana probably know a larger version of Manusmṛti in which ordeals were treated in details, while the possibility of ascribing views to Manu by later writers just for glorifying the subject cannot be ruled out, as is observed by Dr. Kane,— Apart from the Manusmṛti (in which phrases like Manurabravit occur a number of times), such references do not occur at all in Yāj. There are only a few places in Nār. Where such phrases occure and in other earlier Smṛtis also there are a few such references. Some later Smṛtis do mentioned Manu in some cases. The reason is obvious. Manu was famed as the great law-giver of ancient times. Some practices and rules had changed in course of centuries. Later writers wanted changes according to their lights to be recognized, but if they had stated them in their own names, little weight would have been attached to them, therefore they probably hit upon the plan of saying in some cases that the view propounded by them had the authority of Manu.

In many cases, phrases like 'Manurabravīt', Manurāha or Manoranuśāsanam can better be taken as 'Pādapūraṇa'.

(5) Viṣṇudharmasūtra : This sūtra contains one hundred chapters. The first and last chapter are entirely in verse while remaining ones are in prose and verse. Though the number of chapter is so large, the Sūtra is not so extensive. There are many portions in the Sūtra which clearly indicate a later period of the work. The Sūtra contains common passages with those in Manusmṛti. Dr. Kane opines that the VDS borrowed the verses ad hoc or adopted them from the Manusmṛti. The original VDS (mostly in prose) according to him may have to be placed about 300 B.C. to 100 A.D.)

Chapters 9 to 14 discuss the ordeal. Viṣṇu discuses ordeal rather elaborately which clearly indicates a later stage of the development of ordeal than one found in earlier Sūtras or the Manusmrti. Important points with regards to ordeal referred to by Viṣṇu are (I) Free use of ordeal is recommended in the criminal cases while in the civil cases it is to be selected appropriately according to the value of the offence. (ii) Ordeal should be selected appropriately in accordance with the ability of the person undergoing the trial (i.e. his physical health occupation, caste, general nature or mental set-up must be considered before deciding a particular trial) and the season in which it is to be

conducted.(iii) Viṣṇu gives a set of popular methods (such as Dūrvakara etc.) and then recommends the five ordeals. (iv) He describes the procedure of the five ordeals and points out the general preliminaries that are to be observed before the trial. It will thus appear that Viṣṇu has developed all the aspects of the ordeal which are discussed in details by the later Dh.writers.

(6) Yājñavalkya : Yāj, is the first writer to give a systematic treatment to the ordeal. He devotes nearly 20 verses for ordeals. In II-22 he refers to the evidential aspects of the ordeal. In II-95 he mentiones the five ordeals (The list of five ordeals g iven by him has almost become proverbial for the later writers) and puts conditions under which they could be used (e.g. Sirsaka etc.). He discusses the ordeal from the points of view of—(a) the person undergoing the trial, (b) the value of the offence and describes the general preliminaries and the procedure of each of the method.

Viṣṇu has discussed all the aspects of the ordeal while Yāj, has put them in a systematic form. Any way, Visnu and Yāj, together form a group of writers indicating a stage of the development of ordeal in the Dh.literature, They are the pioneers who mainly developed the Dh. system of the ordeal. The later writers have only elaborated the aspects developed by these writers. For the date of Yāj. Dr.Kane observes, ' There is nothing to prevent us from holding that the extant Smṛti was composed during the first two centuries of the Christian era or even a little earlier.

(7) Nārada : There are two versions of Nārada on Vyavahāra, a smaller and a larger one. The text of the longer version was published by Dr. Jolly in Bibliotheca Indica series (1885). An ancient MS of Nar. From Nepal dated 1409 A.D. contains two additional chapters on theft and ordeal. Dr.Jolly includes the first as an apendix and omits that on ordeals on the ground that it is not authentic. Prof. Chintamani prints the text of this chapter on ordeals in the Nepalese MS, held to be spurious by Dr. Jolly in C. Kunhan Raja presentation valume. Before that, the chapter was included in the edition of Nāradīyamanusanhitā with the bhāṣya of Bhavaswāmin, published by K.Sāmbasiva Shāstri in 1929 in the Trivendrum Sanskrit Series. (Vide Appendix II).

Nār.flourished nearly at the same time as or somewhat later than Yāj,'points out Dr.Kane. His treatment of ordeal shows that he comes next to Yāj. He indicates the immediate next stage of the development of ordeal.

Nārada himself is mentioned by name in connection with ordeals (Stanza 253). In his treatment of ordeal, Nār, has in fact tried to reconcile the statements of Manu and Yāj. It will apprear that the earlier writers used the word Śapatha for the divine means of proof. Manu speaks of Śapathas while Yāj, gives Divyas. Nār,'s verses on Śapathas (23-40,243-248) closely follow those of Manu VIII.109-116, IN 249, he points out that the oath should be used in the light offences, while ordeal should be conducted for the grave charges, (this rule can be derived from the rules of Viṣṇu and Yāj. It is however mentioned in a crystal-clear form by Nār. Here for the first time) and then gives in 252 the five ordeals which are the same as Yāj, 11.95. Having thus synthesized the Sapathas of Manu and the

Divyas of Yāj. (The Synthesis between Manu and Yāj, is claimed by Nār, as his contribhution to the systems of ordeal in verse 253 in which he quotes his own name), he adds two more forms to the list i.e. the ordeals of Taṇḍulabhakṣaṇa and Taptamāsa. In both the cases,he starts giving details in the first person (Ataḥ param pravakṣyāmi etc.). We thus find that Nār's treatment of ordeal establishes a clear link with his predecessors and can thus be taken in historical succession to Manu and Yāj.

Manu is named at serveral places in Nāradasmṛti. Verse 250 speaks of Śapathas according to Manu and we see that Nār's statement on Śapathas closely agrees with those of Manu. But in many other places we find that Nār,' does not agree with Manu and the views quoted by him as those of Manu do not correspond to the extant Manusmṛti. In 251, Nār, crdits Manu with dividing ordeal into five kinds and in 326 he gives Manu's views about the poison ordeal. It must be pointed out that in both these cases we do not find corresponding passages in the extant Manusmṛti which can corroborate Nār's remarks. Obviously Nār, had a version of Manu before him that was some what different in certain respects from our Manu or Nār. May be referring to Vṛddha or Bṛhanmanu, observes Dr. Kane. 'the extant Manusmṛti contains only about 2700 verses. Nār, probably arrives at the larger figure by including the verses attributed to Vṛddha Manu and Bṛhanmanu'—he points out elsewhere.

Nār's reference to 'Manu's five ordeals' should therefore be taken cautiously. It should be pointed out that referring to the five ordeals, corresponding Nār's verse in Nāradīyamanusamhitā drops reference to Manu.

It must be pointed out that the five ordeals are mentioned in the Sūtra form in VDS and the Dharmasūtras of Sankha and Likhita, but they are put for the first time in their most up to date form by Yāj. We do not have any direct evidence which may point out the original source or the author who gave the five ordeals. Regarding the possibility of an earlier version of the Yājñavalkyasmṛti, Dr. Kane observes 'From the fact that the Sūtra of Śaṅkha-Likhita cites Yāj, among promulgators of Dharmaśāstra, while Yāj, himself includes Śaṅkha-Likhita among the propounders of Dharma, it may be plausibly said that Śaṅkha. Likhita refer to an earlier Yājñavalkyasmṛti that the extant one. Beyond this there is no evidence to establish that there was an earlier version of the present Smṛti.......... What the original Smṛti contained, whether it was in prose of verse or both , whether it dealt with only Acāra and Prāyaścitta sections are questions on which conjectures may be advanced by there are no substantial materials for arriving at even tolarably certain conclusions.

If we therefore prefer to take 'Daivam Pañcavidham Jñeyamityāha Bhagawānmanuḥ' (251) as an Arthavāda or a case of Pādapūraṇa, we can see Nar. As reconciling the Sapathas of Manu and the Divyas of Yāj. in his treatment of ordeals.

Nār, has contributed to the development of ordeal in his own way, though as a matter of fact he has only elaborated the rules given by his predecessors. (i) He thus details out the rules of the application of ordeal (241-42), but this has ultimately resulted in reserving

ordeal in the very types of offences mentioned by him. (ii) Nār,'s efforts to reconcile the Śapathas of Manu and the Divyas of Yāj, have ultimately led the later writers to distinguish the two varieties into water-tight compartments, (iii) Nar, stressed the Désa-Kāla-Bala aspects of the ordeal. (iv) Nār, has added two new forms.

(8) Bṛhaspati : 'Nārada, Bṛhaspati and Kātyāyana form a triumvirate in the realm of ancient Hindu law. All these three jurists exhibited an excellent analytical insight and most perfect acumen elaborating and explaining juristic principles and philosophy.

Bṛ. is certainly later than Manu and Yāj. It is difficult to state his relationship to Nār. He agrees more closely with Manu than Nār. Does, but in many respects he shows a great advance over Nār. So, he is probably contemporary of or not much later than Nār. Kāt, looked upon Bṛ. As an authority who must have flourished several centuries before. He cannot therefore be placed later than 4th century A.D. He must have thus flourished between 200-400 A.D.

Complete Smṛti of Bṛ. On law has not yet been discovered. ' It will be, when discovered, a very precious monument of ancient India exhibiting high water-mark of Indian acumen in strictly legal principles and definitions.

We find in Nibandhas, many verses on ordeal that are common with Br. and Pit. Prof, K.V. Rangaswami Aiyangar reconstructed Bṛhaspatismṛti in 1941. On p.131 of his introduction to this reconstructed Smṛti he points out that Pit, describes ordeal in about 200 verses. On p.137, he points out the total number of verses on ordeal by Br. as 33 (Dr. Kane also in introduction to his reconstructed Kātyāyanasmṛti gives the total number of Bṛ. Verses on ordeal as 33), while in the 8th Chapter he collects 92 verses describing various ordeals. Many of them are found ascribed to other writers. If we thus consider only those verses which are exclusively attributed to Bṛ., total number of such verses may come between 30 to 35. We prefer to decide and arrange Bṛ. Verses on ordeals as give in Appendix II.

Bṛ.'s contribution to ordeal may be noted as follows:— (i) Bṛ. has given four kinds of judgement. Dharmanirnaya is one of them which is established on account of culprit's own initiative for self-confessing the truth or when it is achieved through means of ordeal. The concept of Dharmanirṇaya brought out by Bṛ. Would itself indicate the mature moral principles on which law is based and would bring out the role played by ordeal in it. (Vide discussion regarding 'The judgement derived from ordeal' in the IV Chapter). (ii) Bṛ. has stressed the evidential aspect of the ordeal and its gradation in accordance with the value of the offence. (iii) Br. Describes nine divyas, but he is specially credited for developing in Phala divya.

(9) Kātyāyana : Kātyāyana is a very important writer who has largely contibuted to the development of Hindu law. He contains the same advanced views about law and rules of procedure as are found in Nār, and Bṛ. He is even in advance of these two writers in certain matters. He gives numerous difinitions. The date of Kāt. Can be settled only approximately. He presupposed Nār. And regarded Bṛ. As a very leading authority. It may

be said that Kāt. Flourished between 4th and 6th centuries A.D. Kāt. Made great contribution to the development of the ordeal. (i) He concentrated upon the evidential aspect of the ordeal. He insisted upon always using the powerful proof and pointed out that ordeal could not get preference to the human proofs which were more powerful. He at the same time gave an exception to this general rule and recommended ordeal in certain cases. (ii) He introduced a very important rule of all ordeals for all persons, discouraging a sort of discrimination amongest these methods on the basis of caste of the person undergoing the trial. (iii) He recognized popular methods prevalent in a particular society. (iv) He disallowed certain persons from undergoing trials. (v) He allowd representatives to undergo the trial in certain cases. (v) He allowed retrial if the first trial failed.

We get Kātyāyanasmṛti reconstructed by Dr. Kane. Kāt. Many a times refers to the views of Bhṛgu. Two such stanzas in which Kāt, quotes Bhṛgu on ordeal are : (i) In all Sāhasas of the worst type, the truth should be found out be means of divine proof even though there may be witnesses. (Verse 231 in Dr. Kane's edition). (ii) According to Bhṛgu, the ordeals of balance etc. are prescribed for those who are suspected in league with marauders who have incurred popular censure, but in such cases there is no undertaking (by the complainant to pay fine) (Verse 413).

It is remarkable that some of the views ascribed to Bhṛgu by Kāt, are found in extent Manusmṛti but in several passages we do not find any counterpart in extant Manusmṛti. Both the verses quoted above in which views of Bhṛgu on ordeal are referred to, do not have correspondence in the extant Manusmṛti. These facts about Kāt,'s references to Bhṛgu and Manu raise many serveral difficult questions. Whether Bhrgu and Manu stand for two entirely different works or for the same work and whether he refers to some other version of the Manu Smṛti ascribed to Bhṛgu? 'In may opinion he is not referring to two separate works and that he had before him a version of the Manusmṛti promulgated by Bhṛgu, but somewhat different from and probably larger than the present Manusmṛti' observes Dr. Kane.

(10) Pitāmaha :- Pitamaha is known to us only from quotations. He is most elaborate on ordeals. He describes nine ordeals in about 200 verses. Pit,'s special contribution lies in the ritualistic development of the ordeal. He gives in details the religious rites and rituals that are required to be performaed before the trial. He stresses tha need to adhere strictly to the rules of prcedure of these methods. Pit, may be assigned to some date between 4th and 7th century A.D.

We have seen above that, Yāj, and Viṣṇu standardized ordeal and moulded it in a difinite system by developing its various aspects. They thus enunciated the lines or the framework in which the topic of ordeal could be discussed. Nār., Bṛ., Kāt. And Pit. form the next stage of the development of the ordeal. They belonged to an age of formalization and classification. They also recognized newer methods which were becoming more popular and deep-rooted in the society. During this period, ordeal was thoroughly investigated in all its aspects and was developed in a full-fledged science. 'The ordeal

should be conducted by the persons expert in the science of ordeal'— these writers point out. It is rather intersting to observe that there appears to be a sort of complementary distribution in the stress laid down by these writers on different aspects of ordeal e.g. Bṛ. And Kāt, laid more emphasis on the consideration ordeal from the point of view of the value of the offence, while Nār. And Pit. Put more steess on the favourableness of the season.

Any way, the topic of ordeal attracted more attention from these writers. Ordeal was gaining more importance. Dh.writer, therefore, devoted more space to the discussion of ordeal in their works. Reasons for such a growth can be given as follows:

(a) One of the principal reasons for getting more discussion on ordeals in later works was that, these writers gave a śāstric treatment to the topic of ordeal which was accepted by them in their system. The Dh.writers realised the importance of ordeal as a deep-rooteed custom. They recognised its utility and admitted it as a method of proof. After admitting it in the legal system it was their duty to develop it properly. The Dh. Writers went into the details of the method and developed it in a full-fledge system. With the advancement of law, one naturally expects lesser importance to be attached to the ordeals and we find that these writers have put so many curbs on the use of ordeal as such, the discussion of the topic has, however, gradually grown in size. The reason is the śāstric treatment of the subject. Sāstric treatment consists of systematizing the subject to the discussed. It involves in defining the norms and classifying its varieties and expects a sort of harmony in the development of the heads or the branches of the subject.

Law of evidence developed gradually. Human proofs came late. They however did not abolish the divine testimony. Both the proofs developed side by side. Discussion of ordeal in these works is naturally co-related with the discussion of other proofs. Other proofs are developed and discussed with more details, so we find a proportionate elaboration of the rules of ordeal in these works.

(b) Another reason for devoting more space to the discussion of ordeal was that, it really grew more popular and was wide-spread. Ordeal declared truth through divine intervention and exercised its influence on the religious minded persons. Ordeal is a religio-legal method. It spread fast during the medieval period when religion has extensive influence on the minds of the people, Universal history of ordeal shows such a development. Priesthood had influenced ordeal. In the days of Pit.we find that ordeal was altoghether turned into a religious ceremony.

Besides the prominent Smṛtikāras discussed above, we find minor Smṛti, writers who discuss only certain aspects of the ordeal. The commentaries and the digests quote stray verses on ordeal attributing them to these writers. These writers are Hārita, Vyāsa, Yama, Prajāpati, Atri and others. Digests also quote verses without ascribing them to any author as such. They are referred to here as Anirdistakartikavancana. Commentariess and digests also quote verses regarding ordeal from the Padmapurana and the Kalikapurana.

Puranas are also influenced by the Dharmaśāstra. Amongst the non-Dharmaśāstra-works discussing the ordeal, special reference should be made to the Kaumarikakhanda of the Skandapurāṇa. 44th chapter of the Kaumārikākhaṇḍa discribes 8 forms of ordeal. The description is obviously influnced by the writings of Nār, Bṛ,., Kāt and Pit. It also discloses typical purāṇic trends mixed with it. e.g. it warns of the various sufferings in the worst type of hell for the culprits who play with this important method of divine origin and assures merits for the person who undergoes it faithfully.

Śukranīti is another such work which describes ordeal as known and practised by the people. It also speaks of the merits or demerits one would accrue by either undergoing ordeal faithfully or by playing mischief with it.

We have seen above that the Dh. literature can be divided in general in three periods i.e. the Sūtras, the Smṛtis and the commentaries and digests. In the last stage of the commentaries and digests, we find that, commentaries on Smṛti works continued to be written almost to the end of this period but the general tendency from the 12th century onwards was to write works not professing to be commentaries on a particular Smṛti, but works that were in nature of digests containing a synthesis of all the dicta of Smṛti writers on the topic of Dharma. Primary function of these works is to explain the original text or to discuss a particular topic as it is found in Smṛtis. They thus seved a very usefull purpose in preserving and giving accounts of the fifferent texts as existed in respective times. The explanations offered in these works however reveals the social and political conditions of the time and are thus very helpful in giving an idea regarding the actual administration of the ordeal. Commentaries of Asahaya, Viśvarūpa, Medhātithi, Maskarin, Vijñāneśvara, and Aparāka are thus full of information regarding the ordeal. Digests like Kalpataru, Vyavahāranirṇaya, Smṛticandrikā, Divyatattva, Vyavahāraprakāśa, Vyavahāramayūkha and Sarsvatīvilāsa delt with ordeal in an exhaustive way and supplied very important information regarding the method as it prevailed in their times. The Smrticandrika, for example, dropped discussion of the Water and Poison ordeals on the ground that they were obsolete, while the Sarasvatīvilāśa has refuted its claim by pointing out that in Utkala the ordeal of water alone was resorted to and in Saurasena and Magadha the ordeal of poison alone was resorted.

It is interesting to note that the discussion of ordeal in the Dharmaśāstra finds complete accordance with the actualities of the times. ' The Dharmaśāstra works have been produced from different parts of the country and some of the Commentaries and Nibandhas were produced under royal patronage by authors who were themselves associated with public administration or were judges. Āpastamba (according to Jolly) was of Andhra country, Baudhāyana of South India, Nārada of Nepal. Medhātithi of Kashmir, Aparārka belonged to Koṅkana, Haradatta to South India and Nanda Paṇḍita to Benares. The author of Subodhini belonged to the North India. Vijñāneśvara produced the Mitākṣara under the patronage of Cālukya rulers, Hemādri was minister of the Yādawas of Devagiri, Lakṣmīdhara was a minister at Kanauja, Caṇḍeśvera was a minister and judge under some Mithila rulers, Mādhava was minister of Vijayanagar and Vācaspati

Miśra was a court Paṇḍita under one of the later Mithila rulers. The author of Nṛsimhaprasāda was a Viceroy (at Devagiri) under one Ahmedanagar rulers and the author of the Sarasvatīvilāsa was a ruler of Orissa. Why should they all have indulged in pastime of writing about a system of judicial administration which never existed?'

Whatever is said in Dharmaśāstra regarding the ordeal is happily corroborated through other sources. Reference to ordeal in literary works co-related with the observations of the Dh.writers, so did the Historical records. Ordeal is reflected in the epigraphic records as also in the accounts of the historical travellers. Many of the Hindu states established in the 17th and the 18th century after the downfall of the Mughal Empire, revived the Hindu Judicial System. The Dharmaśāstra tradition was again revived and the subject of ordeal got increased importance. Through the Maratha records, it is quite clear that the Dh. ordeals were revived once again. Considering the importance of the subject, special manuals were compiled or written on the subject of ordeal collecting the latest information from the Dh. literature, discussing the forms and the procedures of these methods. These works are—

(1) Divyanirṇaya of Dāmodara Thakkur (compiled under the auspices of Muhammada Shah).

(2) Divyadipīkā of Dāmodara Thakkur (compiled under the auspices of Sangrama Shah)

(3) Divyāsamgraha of Sadānanda.

(4) Divyānuṣṭhānapaddhati of Nārayaṇa Bhaṭṭa.

(5) Divyāvatāraḥ—Compilation made by the Paṇḍits of the Madras College.

Ordeal has gone down deep in the society as the custom of the people. It has a great utility in the legal sphare and is adopted by the modern law in form of legal oath. It is not dead even today and is practised by the people in some form or other. It is prominent in the tribes. The tribal information regarding the practics of the ordeal is collected here which only substantiates the far-reaching influence of the Dh. Ordeal on the Indian mind.

Ordeal was practised in all parts of the world. It play a great role in the development of the legal ideas, as also in the social evolution of mankind in general. The anthropologists and the legal academicians have therefore tried to investigate the various aspects of this important medhod. It is intersting to see that the analysis of the oath and ordeal made by old Dh.writers exactly corresponds with the conclusions of the modern writers on the subject.

P

POLICIES AND SCHEMES

Assemblies and committees in mediaeval, and to a limited extent likewise in modern India, met and meet to consult ; not as a means of validating pre-conceived policies and schemes. The power of decision, as we have seen, rested with the ruler in those contexts where the meeting met to advise the ruler. But on the other hand the *sabhā* might well meet, as otherwise individual ministers might approach the ruler independently, in order to discuss a project initiated entirely by the *janapada*, or by a caste, or by some individual such as the merchant in our illustratin. Where the project came before a ruler already furnished with the consents of the relevant prestigious or powerful groups it would be a relatively simple matter to obtain the ruler's *fiat*. The duty of the ruler to satisfy the public enabled them to rely upon his favourable reception of a petition for royal assent to a properly investigated scheme. The decision of a traditional assembly, especially if it purported to declare custom, or to re-establish or reform custom, could be sure of royal approval, which would sometimes be necessary to coerce dissidents, especially if the latter were intending to leave the caste and or the locality in any event.

The British period introduced a novelty. The ruler, i.e. first the East India Company and later the Crown, allowed, without authorising, the decisions of traditional assemblies, such a caste-*panchayat*, provided that these were consistent with natural justice (a requirement related only to judicial activity). The theory that the decision was that of the ruler advised by the *panchayat* seems to have survived. It is most unfortunate that we have no evidence of a decision of a *sabhā* or *pariṣad* being taken to a ruler for his cancellation. But the practice of having, if possible, a representative of the ruler present at the debates shows a fear that a decision might be upset ultimately by the ruler. The fact that in the early days of the East India Company's rule decisions by caste-tribunals including those relating to nominations for headship of religious institutions, were eagerly sought be to set aside, whether by cancellation or appeal judicially, supports the view that the ruler's ultimate responsibility for the spiritual and secular welfare of the

subjects was sufficient authority for his setting aside (if he dared) a decision of a popular or other traditional assembly. But our evidence for medieval times does not amount to this. On the contrary, what we find is that solemn decisions of high-powered and numerous tribunals representative of many points of view and many conflicting interests were reopened by further complaints and further investigations, until ultimately the antagonists, worn out by the conflict, accepted some practical and 'just' solution.

Redressing of grievances was a favourite topic for debate. The duty to abate a grievance was that of the ruler, and apparently that of the ruler alone.

Public control over the ruler or his deputy was exercised indirectly by dilatoriness in paying taxes, refusal of cooperation, threats of revolution. No doubt great tact was used in all such crises. Appeals were made to the higher order of things transcendental obligations, moral law, to *dharma*. This is the reason for all the vague and highflying exhortations in the *dharma-śāstra* in its *rāja-dharma-kāṇḍa*. A ruler whose schemes dismayed many could be frustrated by having his audience-chambers besieged by daily visits from caste-leaders or their spokesmen and representatives of merchant and other powerful classes, patiently waiting for greivances to be redressed!

We are in a position to see public participation in government from two points of view. In the background, ever-present, is the half-detached, half-jealous concern of the people that the ruler shall perform his traditional functions. Their views are voiced by 'natural' representatives. In the foreground the public participates in two obvious ways : (i) by supplying a caste or cadre of skilled administrators competent to look after, primarily, finance and the 'peace' of the population ; (ii) by providing assessors or even judges, and expert committees of jurists to deal with legal business. At periods with a lack of a sufficient number of people with a belief in or skill in the relevant *śāstras*, and the will to apply their knowledge, together with, perhaps, a state of affairs in which appeal to traditional learning was ineffective to settle disputes, deputies of the ruler acted as adjudicators. There is little ground for expecting a third contribution from the public, namely by way of the army (which was also the force to maintain order in other than minor village disturbances). Most soldiers were, in mediaeal times, persons of low caste, criminals, slaves, or part-time soldiers who were also agriculturalists.

But in contrast to this situation, sometimes wrongly described as possessing the features of permanent institutions and 'local self-government' upon western lines, there is evidence of a modification which deserves very close examination. It remains to be determined whether what we find in this evidence is an exception to the general rule, or merely a particular instance of the spirit and practice of mediaeval India which would be more generalised if the conditions had been more general. In South India there existed numerous *agrahāras*, namely colonies or settlements of Brahmans, living upon lands donated to them for the maintenance of their various *śāstras*. The holdings of land were approximately equal, but the lands were naturally not tilled by the Brahmans themselves but by their dependants, families of lower castes who were specialists in agriculture. The

internal government of these *agrahāras* was established in the charters granted at the time of their foundations. According to these the committee of government was actually elected, and there were rules preventing the re-election of persons who had held a seat on the committee after a certain length of time. Rules of procedure were laid down to ensure a democratic control of the affairs of the colony, but of course the electing of the members, and the right to be a member, were confined to the share-holders themselves. The rules and constitution of such *agrahāras* have aroused a merited interest. But they are to be seen as elaborate schemes intended to secure the peaceful management of what was virtually a club in respect of its domestic affairs. The district as a whole, and the kingdom, were certainly not run upon any such lines. It was an exception which proved a rule.

No legislative power lay with any assembly without the actual or nominal consent and 'enactment' of the ruler. But here it is very difficult to generalise. There is evidence of villages, and even sub-divisions, making ordinances which shall be binding upon inhabitants ; likewise castes and communities in full assembly make regulations to be binding thenceforward upon their members — in both cases without overt reference to the ruler or his deputy. It would appear that in matters of custom which did *not* affect the revenue, and where outsiders could not be affected, the powers of excommunication possessed by the local assemblies were sufficient to enable legislation to the effective, and constitutionally allowable, even without the ruler's participation. It was otherwise where the ruler was the patron of the region, where local committees were weak, or where it was necessary to coerce persons outside the reach of bodies which could exert force only by way of excommunication. We have to remember that, in general, force of a coercive character such as mutilations and imprisonmant were beyond the powers of any but the ruler and his deputies. The king's own powers of legislation were confined to his traditional fields of secular regulation. He could not certainly, by regulation, take away one of the alternatives which the religious law might allow, or require some conditions to be observed, provided that this could be supported from the *dharma-śāstra*.

The villages themselves, basing their activity upon the sanction of custom, exercised considerable executive powers, particularly in the way of apportioning the revenue, and in policing their districts. Control of the police, exercise of petty criminal jurisdiction, and supervision of the market were in the hands of officials appointed by the village elders. In times of poor central organisation we find judicial powers exercised by very large courts, whose members represented wide areas of territory and perhaps the main castes in the region. The larger the court, the greater chance that the decision would be respected by the parties.

Historical instances of ministers supplanting their masters and becoming *de facto* and even *de jure* kings themselves are not rare. Political theory in mediaeval South India contemplated constitutions in which the kings delegated large responsibility to their ministers and virtually ruled along with them.

Modern India allows participation of the public indirectly through local committees known as *panchayats* (referred to above) whose scope of activities is naturally narrow, and through the state and central legislatures, to which ultimately the municipal and government authorities are responsible. Public participation in justice exists by way of the caste-*panchayats* referred to above and in the jury-system for criminal trials in certain courts : both of these fields for participation are so narrow that they may virtually be ignored. The civil service, as trained specialists, handle the day-to-day business of government, subject to the interference of politicians who want favours for their supporters.

The method of deliberation, both in ancient times and today, appears to have been with the seniormost speaking first. The young, no matter how qualified, are supposed to remain silent in the presence of elders, unless invited to contribute. The concept of an individual putting his own view-point is un-Indian. There are two reasons for this. Firstly speech, especially public speech, is not a method of frank and uninhibited self-expression. One must observe one's relationships in all contexts, particularly in public; and the relationship which is for the moment uppermost many remove completely a consciousness of a private and individual view-point. Secondly, individuals whose own intrests conflicted with those of the group to which they belonged must always have been rare. An individual without a group would in any case never obtain a hearing in, or membership of, a *sabhā* of any kind. The principles governing debate in any wordly *sabhā* would apply equally to meetings of unwordly people; *sanyāsīs* who had nominally abandoned the world and its etiquette; and deference and disinclination to obtrude a selfish or individual viewpoint would be as much required of a *sanyāsī* as of a householder.

In the Vedic period decision *may* have taken place by majority. Traces of majority decision exist in Buddhist texts, based, as we suppose, upon the secular practice of the aristocratic societies. Acclamation and even voting with voting tickets are referred to. With the disappearance of institutions (save for the *agrahāras* referred to above) in which members were theoretically equal, decision by majority disappeared. All decisions in India were, until the advent of European-type institutions, unanimous. Until unanimity was achieved decision was postponed. If it became imperative to take a decision, schism was risked. Hence voting, and counting of heads are quite uncharacteristic of India, and modern India had has difficulty in assimilating this innovation. The tendency seems to be to elect the man whom one would, on traditional grounds, wish to have as one's representative ; the notion that the candidate who has failed to win the election does *not* represent anybody is also an uncongenial notion. Appeals to the electorate for votes are a novel feature of the Indian scene, they frequently take the form of attempting to associate the candidate with some principle (cutting across caste where possible and utilising caste-alignments where not) which the voter is expected to approve of, whoever the candidate might be. This is an uneasy combination of Indian and western approaches to selection of a representative. To test the theory that counting of heads is anathema to traditional India one might observe how decisions are made in so westernised an organisation as a trade-union meeting. The present writer would be very surprised to

learn that decisions are made by a show of hands. If this ever occurs the union is indeed far from the 'old' India.

The Committee

By associating the ruler or his deputy with the committee or assembly an attempt was made, where possible, to unite the prestige of government with the prestige of social opinion. Only in highly technical fields, such as Brahmanical ritual and secrets of artisan and other guilds, would the ruler be excluded. The organs of power and the organs of public expression were thus normally interdependent if they had any force at all. Public resistance to un-traditional acts on the part of the ruler could amount to prohibition. By evading participation in the schemes of A the general public could convey prestige away from A and towards B. No one was compelled to take part in anything unless he would transgress caste usage by idleness. The result must have been the same self-contained character of the habitual 'participators' that we find in modern, non-bureaucratic countries.

Since leaders were natural and not elective they were nòt responsible to the public whom they represented. This historical background explains a features of modern Indian politics. Members of the legislatures, even members of cabinets, are likely to be re-elected even if their policies are disapproved of by the majority of the legislature in question and all the organs of public opinion.

The Government Responsibility to the Man

The movement towards a government responsible to the 'man in the street' requires the development of two non-traditional entities. Firstly, the concept of the 'man in the street', the citizen as such detached from the pervasive mutual bargaining, the casterism and regionalism of which modern politicians constantly complain; and secondly a concept of a representative's dependence upon his constituents. At present the individual Indian, especially in the vast rural areas, is lacking in personality and sees himself, and is seen by politicians, as merely a member of a group, or rather of many concentric groups, the interests of which, in sum, can be predicted. Corruption, the oiling of the wheels of administration, favouritism, and all the inequalities of which people complain, happen because the only interests which strike the politician as real are those of his immediate supporters and those of the vast, scarcely comprehensible unit, the state or region from which he is sent to Parliament or the Legislative Assembly.

Personal participation in government is therefore that of the politician and of those to whose pressures he must submit. He is not dependant upon all the constituents, for if he still carries with them an inherited prestige or a prestige acquired by any of the traditional methods, he can be re-elected whatever his policies, or even if he has no policies. Responsible government, which is not merely a question of governing so as to lose the confidence of the legislative body, cannot occur without a much tighter link

between the constituent and the politician than subsists at present. At present, while the Indian government is still the bearer of the prestige of the pre-Independence *Sirkar,* the members of Parliament and M.L.A.'s are petty *rājas,* a rôle for which many of them are hardly equipped. But the people get a government which they deserve, and the average Indian does not see, as yet, a perceptible shortening of the distance between the *Sirkar* and himself; and in this process of communication.

It is conceivable that a more genuine trend will appear. Instead of the dramatic choices at the polls and the secret influences exerted on M.P.'s and M.L.A.'s, idels may be achieved through compromises and delays. The *Sirkar* of today is much too precipitate and active for the liking of the traditionally minded. There is too much government. Public money, in too large quantities, flows too fast and in too many directions. Upon the theory of the consent of the people, schemes are inaugurated in great numbers, to which no recognisable people can be assumed to have consented. The fact that a government remains in office is taken largely as carte blanche, and the credit for achieving Independence enabled the Congress Party to remain in power without effective opposition. The traditional deference goes to untraditional lengths for untraditional ends. The best illustration is the draconic alteration of the personal laws of the Hindus, an example of what appears to be a tyrannical reform of society, in the best humanitarian and 'civilising' interests of the nation. There the lack of an intimate connexion between the public and the legislature enabled a very radical, and in places a rather poorly-drafted, code to be enacted, irrespective of the question whether it would be known to or understood, let alone obeyed, by the multitude of Hindus. Perhaps a new method of democratic government will evolve rather than the present adaptation of democratic forms to ends which are not noticeably democratic as that word is understood in democratic countries. Yet it must be admitted of the present set-up in India that it is no tyranny as that word is understood in the West. Elements which are at odds with the government are free to exist, if not always to express themselves, and dissidence is as free as it was before Independence, or indeed before the British period. Prestige-worthy elements in the population obtain a hearing in the highest quarters, and that is roughly what could be hoped of traditional Indian government machinery, at its best, at any time prior to, and even sometimes during, the Muslim period.

PĀRIJĀTA AND THE MADANA-PĀRIJĀTA

The *Pārijāta*, often quoted by the *Kalpataru* and the *Ratnākaras* of Caṇḍeśvara, was assigned to a period between AD 1000 and 1125 and it was pointed out that the *Pārijāta* quoted by the *Kalpataru* was altogether a diferent work from the *Madana-Pārijāta*. The *Madana-Pārijāta* was assigned to a period between AD 1360 and 1390 in the *History of Dharmaśāstra*, Vol. I, p. 389. In a recent case before the Patna High Court a passage of the *Madana-Pārijāta* assumed importance and incidentally the date of the *Madana-Pārijāta* came in for discussion. Mr. Justice Dhavle, himself a Sanskrit scholar, after quoting the

views of Ghose, Sarvadhikari and myself about the date of the *Madana-Pārijāta* ultimately left the question of date undecided (p. 579) but remarked, 'we have had lawyers on both sides in this case who are familiar with Sanskrit and none of them, though invited to do so, has referred us to any quotation in the *Ratnākara* or the *Cintāmaṇi* from the *Parijāta*, which is not to be found in the *Madana-Pārijāta*'. Among the lawyers engaged in the case was the eminent Sanskrit scholar and antiquarian, the late Mr. K.P. Jayaswal. It becomes necessary to examine this question very carefully in view of the failure of eminent scholars and lawyers to shed light on it by setting forth some passages or opinions attributed to the *Pārijāta* in early works like the *Ratnākaras* of Caṇḍeśvara and to search for them in the *Madana-Pārijāta* and to show from this investigation that the *Pārijāta* quoted by the *Kalpataru* and Candesvara is different from the *Madana-Pārijāta* . A detailed or extensive examination of all passages cited from the *Pārijāta* (which are several hundred in number) cannot be attempted here within the space allowed, nor is it necessary to do so. The passages may be divided into three classes: (1) Those in which certain views are attributed to the *Pārijāta* which are not found in the *Madana-Pārijāta*; (2) those in which the *Madana-Pārijāta* holds views or gives explanations which are opposed to or different from the views or explanations attributed to the *Pārijāta*; (3) those in which certain views or texts are stated to have been not mentioned in the *Pārijāta* which are yet found in the *Madana-Pārijāta*.

In this paper VR, KṛR and GṛR respectively stand for the Vivadaratnakara, the *Kṛtyaratnākara* and *Gṛhastharatnakara*; Mpā stands for *Madana-Pārijāta*.

I. Passages in which certain remarks are attributed to the *Pārijāta* which are not found in the *Madana-Pārijāta*.

(a) The *VR* quotes (on p. 465) a *sūtra* of Saṅkha-likhita *sa yadyekaputraḥ syād dvau bhāgavatmanaḥ kuryāt* and notes (on p. 466) that the *Pārijāta* explained *ekaputra* as *jyeṣṭhaputra*. But this explanation is not found in the *Mpā*.

(b) The *VR* on p. 476 refers to *Manu*, IX. 125 (that among sons born to a man from wives of the same caste there is no seniority due to the seniority of wives in accordance with the dates of marriage but there is seniority anong sons according to the date of birth) and states that Lakṣmīdhara holds that the special share given on partition to the eldest son is to be given to that son, who though younger in age (than other sons) is the son of the eldest among wives and that the *Pārijāta* also accepted the same view. There is nothing in the *MPā* corresponding to this.

(c) The *VR* (p.505) quotes several verses of *Kātyāyana* on property impartible by its very nature, one of which is 'pastures, ways and clothes on the body, *prayojya* and the materials used by craftsmen (such as cotton) are not divisible according to Bṛhaspati' and then states that according to Halāyudha *prayojya* means 'money lent to a debt', while *prayojya* means 'a book and the like' according to the *Pārijāta*. In *Mpā* (on p. 685) the first quarter about a debt consigned to a cocument is quoted, but nothing is said by way of explaining *prayojya*.

(d) The *VR* (p. 589) quotes *Manu*, IX. 190 the widow of a sonless deceased person should secure a son through a *sagotra* and should hand over to that son whatever wealth may have been that of the deceased) and adds the view of the *Pārijāta* that the wisow should not herself take the wealth. The *MPā* does not say anything about *Manu*, IX. 190.

(e) The *GṛG* (p. 147) says that certain texts of Devala (on *śauca*) were explained by the *Pārijāta* as applicable only to women, śūdras and persons whose *Upanayana* had not yet been performed. In the *MPā* (pp. 44-50) there is a section on sauca in which, thouth many of the verses on sauca quoted from the *Smṛtis* in *GṛR* are also cited, this explanation about the passages of Devala is not found.

(f) On snana the *GṛR* (p. 195) quotes Yāj., I.159 that one should not bathe in the reservoir of another without taking out five lumps of clay (or vessels of water) and observes that this applies only when the reservoir has been dedicated to the public and that this is the view of the Prakāsakara, of the *Pārijāta* and of śridatta. In the *MPā* (p. 243) *Yāj.*, I.159 is quoted but there is no such explanation of that verse as is ascribed to the *Pārijāta*.

(g) The *GṛR* (p. 205) quote a verse which reads *srotaso vai naraḥ snātvā sarvapāpaiḥ pramucyate* and remarks that the *Pārijāta* reads *srotasi* for *srotasaḥ* in that verse. That verse and the reading noted is not found in the *MPā*.

(h) The *GṛR* (p. 249) quotes a verse of Vasiṣṭha on *Japa* (26.13) and then sets out the explanation of the *Pārijāta* that one who has mastered the whole *Veda* should repeat texts from his *Veda*, one who has learnt only a portion of the *Veda* of his school should mutter the *Puruṣasūkta* and the like, and one who know only the *Gāyatri* should repeat verses from some *Purāṇa*. This is wanting in the *Japa* section of the *MPā*.

II. Passages where the explanation of the *Pārijāta* deffers from that of the *MPā:*

(a) After quoting Nār;, (*Dāyabhāga*, verse 7) that the husband of the girl is the father of the Kānîna, Sahodha and Gūḍhaja sons and declaring them to be entitled to a share in his wealth, the VR, (p. 565) mentions the explanation of the *Pārijāta* that if the girl's father (i.e., maternal grandfather of the Kānîna and Sahodha) be sonless, then the Kānîna and Sahodha become his (i.e. maternal grandfather's) sons, but if the maternal grandfather has a son, then the Kānîna and Sahoḍha belong to the husband of their mother and that if both the maternal grandfather and the husband are sonless, then they become the sons of both. The *MPā* (p. 652) on the other hand says that the Kārnina becomes the son of the husband when the girl is married, but if she is not, then the Kānîna belongs to the maternal grandfather.

(b) In the *Vyavahāraprakāśa* of Mitramiśra (p. 524) it is stated that the view of several

digests such as the *Smṛticandrikā*, the *Madanaratna, Kalpataru, Ratnākara* (of Caṇḍeśvara) and the *Pārijāta* was that the mother succeeded as an heir after the father. But the *MPā* (p. 672) on the other hand holds the view that the mother succeeds as heir before the father.

(c) The *GṛR* (p. 140) after quoting Manu, IV. 46-47 forbidding the answering of the calls of nature on *parvata* and *parvata-mastaka* says that according to the *Pārijāta* both *parvata* and its top are mentioned for the purpose of conveying that where it is impossible to avoid answering such calls of nature on a mountain, at least the top of the mountain should be avoided. On the othe hand the *MPā* (p. 43) does not first read *parvata-mastaka* (but *na bhasmani. na gomaye*) in *Manu*. IV. 47; then notices the reading *parvata-mastaka* and remarks that *parvata-mastaka* is employed to indicate that more blame attaches to answering calls of nature on a mountain summit than on a mountain.

(d) After quoting Dakṣa. II.9 that the morning bath is commended because it yields seen and unseen rewards the *GṛR*, 180 cites the explanation of seen and unseen rewards from the *Pārijāta* which do not agree with the explanation given by the *MPā* (p. 62) of the same.

(e) The *Suddhitattva* (ed. by Jivānanda, 1895, p.398) says that *sāpiṇḍya* of brothers and the like based on the offering of piṇḍas in *śrāddha* was propounded by the *Matsya Purana* and by Baudhāyana and was so explained by the *Kāmadhenu, Hāralatā, Kalpataru, Pārijātakāra* and others. But the *MPā* (pp. 129-31) explains at great length that *sāpiṇḍya* is based on connection or continuance of particles of the dame body, that this theory is simple and easy of application, while the theory of *sāpiṇḍya* based upon the offering of *piṇḍas* is vitiated by cumbrousness (*Kalpanā-gaurava).*

III. An interesting passage in which a text is stated not to have been mentioned in the *Pārijāta* which as a matter of fact is found in the *MPā* is as follows:

The *VR* (P.499) states that in a certain *samhitā* verse ascribed to Hārita is quoted (viz... that when one member of joint family recovers by his own labour land that once belonged to the family but was lost to it, the other members get a share therin after giving one-fourth to the acquirer) but that this is improper, since that verse is not contained in the *Smrtimāharnava*, the *Kamadhenu*, the *Kalpataru*, the *Pārijāta* and other works, The *Dāyatattva* after quoting the words of the *VR* argues that *VR* is not correct since the same verse (ascribed to Śaṅkha) is found in the *Dāyabhāga*, the *Mitākṣarā* and other works. That verse is quote in the *MPā* (P. 684) as from Śaṅkha and is also explained.

In the *Kṛtyaratnākara* the views of the *Pārijāta* are quoted several times on matters which are not dealt with in the *MPā* at all; e.g. *KṛR*. p. 31 (that even *Pancarātra* and *Pāśupata sāstras* are authoritative when they do not contradict the *Veda*), p. 54 (about general rules on *vrata*), p. 59 (about thẹ *devatā* of a *mantra* when it is not expressly stated), p. 61 (explanation of a passage from the *Brahma Purāṇa* about a *samidh* of Aśvattha) p. 66 (about

the requirements of proper *kuśas*) p. 92 (about *Homa-dravya).*

The above discussion will, it is hoped, convince scholars that the *Pārijāta* is entirely different from the *Madana-Pārijāta*. It is further to be noted that the chronological position of the two referred to aboue makes their identity impossible.

PASSAGES FROM THE RĀJAMĀRTAṆḌA ON TITHIS, VRATAS AND UTSAVAS

To the *Journal of Oriental Research*. Madras, (Vol. XXIII for 1953-54) I contributed a lengthy paper (pp. 94-127) on 'King Bhoja and his works on *Dharmaśāstra* and Astrology'. Therein I referred to five works ascribed to bhoja that are concerned with astrological matters in relation to *Dharmaśāstra*. Out of these five the most important is the *Rājamārtaṇḍa*. I pointed out that at least two hundred verses from the *Rājamārtaṇḍa* are quoted in the medieval digests (such as the *Kṛtyaratnākara*, the several *Kaumudīs* of Govindānanda and the *Tattvas* of Raghunandana) and expressed a hope that some young scholar would undertake to produce a critical edition of the text of the *Rājamārtaṇḍa*. As it contains 1462 verses it might be years before such an edition appears. Since the *Rājamārtaṇḍa* is one of the earliest extant *nibandhas* on such topics of *Dharmasāstra* as *tithis, vratas* and *utsavas* (which are matters to be discussed in the 5th and last volume of my *History of Dharmaśāstra*) I deemed it advisable to prepare a tentative edition of the portions of the *Rājamārtaṇḍa* (from three Mss. that I could secure) dealing with *tithis, vratas* and *utsavas.*

The three Mss are:

(A) The Ms of the *Rājamārtaṇḍa* in the Bhandarkar Oriental Institute at Poona, (D.C. Ms. No. 432 of 1879-80, described on p. 108 note 28 of the above-mentioned paper). It was copied in *Saṁvat* 1655, Caitra, i.e., in AD 1598 and is fairly old. It contains *pṛṣṭhamātrās.*

(B) This and C are Mss of the *Rājamārtaṇḍa* deposited in the Oriental Institute, Baroda. Both these Mss contain *pṛṣṭhamātrās*, but C appears to be the older of the two. They both agree very closely as the footnotes will show, though they frequently differ from A, and, if a guess may be hazarded, B is probably a copy of C or at least both had the same original before them. Both contain no date of copying. They may be briefly described as follows. B represents accession No. 9318. it has 75 folios with ten lines on each side of a folio, with about forty letters in each line. The handwriting is good but the scribe was probably indifferently acquainted with Sanskrit and it has a much smaller number of *pṛṣṭhamātrās* than C or A.

(C) This is accession No. 3272. The folios are 27, but the last two are torn in two pieces. The two pieces of folio 26 are there but one piece of folio 27 is wanting. The corners of the last six folios are worn out and therefore the figures of the number of the folios after 21 cannot be made out. This Ms. has the largest number of *pṛṣṭhamātrās* of all the three Mss. It is copied in a very small hand, the letters being clear enough, although the ms. has a worn-out appearance There are 17 lines on each side of a folio with about 65 letters in each line. The Ms. may be about 500 years old.

The principal Ms. is A. It has numbered the verses and I point out the folios in the notes where the verses cited here can be found. For ready reference the verses set out here are consecutively numbered by me. All the three Mss. are full of mistakes, but they serve to correct one another, I hope that I have been able to present a tolerably correct and readable text. The footnotes mention only important various readings. I have given a few references to some medieval digests wherein some of the verses occurring in the *Rājamārtaṇḍa* and contained in this communication are quoted. I have pointed out in the paper quoted above (pp. 113-14) and here also that the *Rājamārtaṇḍa* borrows many verses from other works without acknowledgement; even so some digests quote these borrowed verses as those of the *Rājamārtaṇḍa*.

Paurāṇa-Dharma

Purāṇa as a class of literature appears to have existed in very ancient times. The *Satapatha Brāhmaṇa*, XI.5.6.8 refers to *Itihāsa-Purāṇa*. In Satapatha, XIII.4.3.13 it is stated that on the 9th day of the Pāriplava some part of *purāṇa* called Veda should be recited. In the *Chāndogyopanisad*, III.4.1 it is said that the hymns of the Atharvangiras are the bees and *Itihāsa-Purāṇa* is the flower and in enumerating the sacred literature known at that time the same Upanisad (VII.1-2 and 4) designates *Itihasa-Purana* as the fifth Veda. The *Bṛhadāraṇyakopaniṣad* (II.4.10 and IV.1-2) contains a long list of sacred literary works in which arter the four *Vedas* occur *Itihasa, Purāṇa, Vidyās* and *Upaniṣads*. The *TaiA* (II.10) speaks of *Brāhmaṇas, Itihāsas, Purāṇas, Kalpas* and *Nārāsamsigāthās*. In the *Atharvaveda*, XI.7.24 it is said that from *ucchiṣṭa* were produced *rks, sāmans, chandas, Purāṇa* together with *Yajus*.

The *Sānkhāyana Srautasūtra* (16.2.27) mentions *Purāṇa-Veda* and states that on the 9th day of *Pāriplava* one should recite the *Purāṇa* (in the singular) while the *Āśvalāyana-śrauta* (X.7) provedes that *Purāṇa-vidyā* (which is *Veda*) shouls be recited on the 8th day of *Pāriplava*. The *GautamaDhS* (8.6 and 11.19) states that a well-read brāhmaṇa is one who is cever in *vākovākya* (riddles, questions and answers) *Itihāsa* and *Purāṇa*. The *APDhS* quotes the view of a *Purāṇa*, twice quotes two somewhat archaic verses from a *Purāṇa* and the view of *Bhaviṣyat Purāṇa* (*vide*. 1.10.297, 1.6.19. 13, II. 9.23.3 and II.9.24.6). These references are sufficient to establish that centuries before the Christian era there was either one work called *Itihāsa-Purāṇas* or there were two works, one called *Itihiisa* and the other called *Purāṇa* which contained calso verses. That work or those two are now lost. It is not possible to hold that the extant *Purāras* are the works referred to in the *Satapatha*, the *Upaniṣads* and the *Srauta* and *Dharmasūtras*. The *Matsya Purāṇa* probably echoes a well-known tradition of its day when it asserts (53.3-4) that Brahmā remembered *Purāṇa* first among all *Sāstras*, that then the four *Vedas* issued from the mouths of Brahmā and that originally there was one *Purti1a* alone, its extent being one hundred crores of verses. The first portion of these words occurs in *Vāyu*, 1.60- 61, *Brahmāṇḍa*, 1.1.40-41 and *Padma*, V.1.45, while *Nāradīya*, 1.92.22 has the verse *purāṇam-eka-mevāsit sarvakalpeṣu mānava*. The

extant *Purāṇas* may probably be recasts of the ancient *Itihāsa-Purāṇa* or *Purāṇa* made in the first centuries of the Christian era.

The extant *Purāṇas* were composed at a time when there was a re-statement of the Brāhmaṇical religion. philosophy and practices after Buddhism and Jainism had begun to show signs of waning. They effected a silent revolution in the religious ideas and practices of the people, without saying directly that the ideals of Vedic society were to be given up. They follow a procedure which has been a special characteristic of Hindu society and its leading works from the most ancient times. Flesh-eating and offerings of flesh to gods were common in the Vedic age. But even in the *Ṛgveda* there is apparently an undercurrent in certain verses that offerings of fuel sticks and oblations of *ghī* are as efficacious in securing favours from gods as flesh offerings. For example, *Ṛgveda*, VIII.19. 5-6 assert 'whoever offers (worships) to Agni with a fuel stick or with an oblation of *ghi* or by means of *Veda* (study) or who performs a good sacrifice by bowing (to Agni), for him alone run fleet horses and his alone is the most brilliant fame'. Compare *RV*, VI.16.47 also. A similar attitude is found 'in some of the *Upaniṣads*. The *Muṇḍakopaniṣad* says (I.1.4-5) 'one should know two *vidyās parā* (the higher) and *aparā* (the lower); the latter is constituted by the four *Vedas* and the six subsidiary lores, while the higher *vidyā* is the one whereby that Imperishable (Reality) is known.

Here the four *Vedas* are said to be inferior lore and the *Upaniṣads* are said to be superior lore. The same *Upaniṣad* (I.2.7) condemns *aparā-vidyā* when it states that sacrifices are infirm or leaky boats and that those foolish people who look upon these (sacrifices) as the highest good become subject to a cycle of births and deaths. The *Kaṭhopaniṣad* (I.2.4) says in the same strain that what are known as *avidyā* and *vidyā* are very contradictory on all sides. In the dialogue between Sanatkumara and Nārada (Chandogyopanisad, VII.1.) the former replies that all the four *Vedas, Itihāsa-Purāṇa* and the other lores that Nārada studied are mere names and that he will tell him (Nārada) what is beyond. Though there are some *Upaniṣad* passages which treat the *Vedas* as inferior, the *Upaniṣads* generally treat the *Veda* as authoritative for certain purposes and actually quote several Vedic verses in support of their statements. For example the AitUp, II,5 quotes RV, IV.27.1 *(garbhe nu), Praśnopaniṣad,* I.10-11 quote RV, I.164.12 *(pañcapādam), BṛUp,* II.5.16-17 and 19 quote RV, I.116.12,I.117.22, VI.47.18 respectively. The *Muṇḍakopaniṣad,* II.2.10 emphasizes that *brahmavidyā* is to be imparted only to those who are *storiyas* (who have studied the *Veda*), who engage in their duties, and who have properly performed *sirovrata.* Similarly, it is said, in the *BṛUp* (IV.4.220) that brahmanas desire to know this (great Self) by means of the study of the *Veda,* by sacrifices, by gifts, by *tapas* (penance) and by fasting. Thus it is clear that the *Upaniṣads* accept the Vedas and the religious rites enjoined therein as preparatory means to a knowledge of the higher truths about the supreme spirit and do not altogether give up the *Vedas* and sacrifices as quite useless.

The extant *Purāṇas* adopt a similar attitude. They speak highly of the *Vedas,* prescribe many Vedic *mantras* for different religious rites and ceremonies: but at he same time they introduce such revolutionary changes in the conceptions, rites, duties, usages and practices of the people that the whole aspect of Hindu society dominated by the *Purāṇas*

becomes a great deal different from the Vedic society or the society at the time of the *Srauta* and *Gṛhyasūtras*. This will be illustrated below:

The *Mahābhārata* and some of the *Purāṇas* exhibit a famous verse which says "one should strengthen the *Veda* by (the study and application of) *Itihāsa* and *Purāṇa*. The *Veda* is afraid of the man of meagre learning (with the thought) that he (the man of little learning) may injure it. "The *Vāyu Purāṇa* (1.200) emphasizes in this connection that *dvija* who knows the four *Vedas* together with the *angas* (subsidiary lores of grammar, etc.) but who does not know *Purāṇa* would not be a conspicuous (or clever) man. Similarly, the *Kūrma* observes (II.46.129): if all the *Purāṇas* together with *Itihāsa* are placed on one side and the highest Veda on another, it is the *Puranas* that will surpass (the *Veda*).

Many of the *Purāṇas* describe how the several *Vedas* and their *sākhās* came into existence. For example *Vāyu* chapters 60, 61 and 65 (verses 24-27), *Agni*, 150.23-31 and 271.1-10, *Varāha*, 2.76-80 (*Ṛgveda*, *Yajurveda*, and *Sāmaveda* are respectively *Nārāyaṇa*, Brahmā and Rudra), *Viṣṇu Purāṇa*, II.11.13 (*Ṛgveda*, *Yajurveda* and *Sāmaveda* are respectively Brahmā, Viṣṇu and Rudra), *Brahmāṇḍa*, II ch. 34-35.

A few striking examples to show how the *Purāṇas* utilize Vedic mantras and legends may now be cited. As the *Brahma Purāṇa* is said to be the first of the 18 *Purāṇas* (e.g. by *Viṣṇu Purāṇa*, III.6.20, by *Brahma*, 245.4, by the *Mitākṣarā* on *Yājñavalkya*, I.3 and by Hemādri on *Srāddha*, p. 1551), it will be dwelt upon first. *Brahma*, 129.62 (*ardho jāyā iti śruteḥ*) refers to *Taittirīya-Saṁhitā*, VI.1.8.5 (*ardho vā eṣa ātmano yat patnī)* and *Satapatha Brāhmaṇa*, V.2.1.10 *(ardho ha vā eṣa ātmano yaj-jāyā); Brahma*, 140.22 quotes RV, II.12.1 *(yo jāta eva); Brahma*, 174.14-16 are RV, IX.114.2-4 (in a different order) and 174.17 is RV, IX. 112.3; *Brahma* ch. 151 contains the story of Purūravas and Urvaśi, verses 4 and 12 of which echo the very words of RV, X.95. 16 and 15; *Brahma*, 152.34 is the same as RV, X.109.6; *Brahma*, 120.9 is almost the same as RV, X.97.22; *Brahma*, 233.62 refers to *Muṇḍakopaniṣad; Brahma*, 158.27 is a close paraphrase of RV, I.164.46; *Brahma*, 161.41 expressly mentions *Puruṣasūkta* and verses 44-49 echo the words of RV, X.90.7-8, 12-14; *Brahma*, 171.28-38 are a condemnation of gambling, verse 32 of which is based on RV, X.34.10-11.

A few passages from some other *Purāṇas* on the same topic may now be set out. The *Viṣṇu Purāṇa*, IV.6.64 (in the story of Urvaśī and Purūravas) states that the king uttered a Vedic hymn (RV, X. 95). The *Matsya Purāṇa*, ch. 93 (dealing with *homa* to the nine *grahas*, planets) employs nine Vedic *mantras* five of which are different from those employed by Yājanavalkya (I.300-1). The same *Purāṇa* (237.13) prescribes that when evil portents indicated by animals or birds occut the five verses of the hymn (RV, X. 165.9 beginning with *devāḥ kapota)* should be recited; *Matsya*, 265.9 prescribes for bringing about the purification of an image of *liṅga* four mantras, viz. RV, VII.49.1-3 and X.9.1 Agni, 41.6-8 prescribes numerous Vedic *mantras* at the time of laying down stones or bricks when building a temple. The *Kāśi-khaṇḍa* (of the *Skanda Purana*) in 9.60-61 quotes *Vājasaneya-saṁhitā*, 32.4 *(eṣo ha devāḥ).*

It is very interesting to note that the *Purāṇas* not only prescribe Vedic *mantras* in

several rites, but also insist on the inclusion of Pauranic *mantras* in many rites. For example, *Yāj;,* I.229 prescribes only *RV.* II.41.13 as the *mantra* for invoking Veśve-Devas in *śrāddha,* but the Mitākṣarā adds that a *smārta mantra — āgacchantu mahābhāga* should also be recited. This is *Garuḍa Purāṇa,* I.218.7. It is ascribed to both Bṛhaspati and *Brāhma Purāṇa* by the Kalpataru on *śrāddha* and by Aparārka (pp. 478, 481). The *Vāyu Purāṇa* (74. 15-16) prescribes that the *mantra* 'Perpetual adoration to the gods, the *pitrs* and to the great *yogins,* to *svadhā* and to *svāhā* should be repeated thrice at the beginning and end of a *śrāddha* and at the time of offering *piṇḍas'*. This *mantra* is prescribed for this purpose by seven *Purāṇas* and is called *saptārcis.*

The peculiar features introduced by the *Purāṇas* in religious rites and practices may now be alluded to. The most characteristic thought and the key-note of *Purāṇas* is how great results could be secured with little effort. Vyāsa states in *Brahma Purāṇa* (229.61-65) 'in the blessed *kali* age great rewards arise in return for a little trouble.' The same note is struck by *Matsya* (69.3 and 78), *Viṣṇu Purāṇa,* VI.2.34, *Padma,* VI,53.5-6. As a consequence of the above dominant principle, the *Purāṇas* lay great emphasis on *dānas* (gifts, particularly of food), on pilgrimages and baths in sacred waters at certain times, vratas, performance of *śrāddha, ahiṁsā* and *bhakti.* These will be briefly illustrated by quotations.

Gifts have been highly eulogised from, the *Ṛgveda* downwards. The subject of dāna has been dealt with in the *History of Dharmaśāstra,* Vol. II, pp. 837-88. Here I shall refer only to two points viz. gifts of food and gifts to brāhmaṇas. Several *Purāṇas* wax eloquent over gifts of various kinds such as *Agni,* 208-213, *Matsya,* 82-92 and 274-289, *Varāha,* 99-111. The *Ṛgveda* (X.117.6 condemns as purely sinful the man who did not offer food to the gods of men (such as friends and guests) and used food cooked by him for himself alone. The *Bhagavadgitā* contains the same dictum. The gift of food, particularly to brāhmaṇas, is highly praised in some *Purāṇas* such as *Brahmā,* 218.10.32, *Padma,* V.19.289-307, *Agni,* 211.44-46. The *Brahmā* says that the gift of food is superior to all other gifts, since food is very life of men and that on feeding ten thousand brāhmānas a man even if always addicted to sins becomes free from *adharma.* It is said in the *Agni Purāṇa* (211-44-46) that there is nothing higher that gifts of food, that gifts of elephants, horses, chariots, slaves (male and female) and houses do not come up even to a 16th part of *annadāna* (in merit) and that a man having committed very great sins and then making gifts of food becomes free from all sins and secures inexhaustible worlds. Almost up to the present days all Hindu house-holders regard it as a duty to give food to the needy and particularly to poor and deserving brāhmaṇas and students, but during the last few years the shortage of food, high prices and rationing have gradually lessened the age-long sentiments on *annadāna.*

Some of the *Purāṇas* set at naught the rule of Manu (III. 149) that in rites for ancestors the family and character of brāhmaṇas to be invited should be carefully investigated. Both Padma (V.29.212) and the *Skanda* (*Kāśi-khaṇḍa,* 6.56-57) recommend that at *tīrthas* one should not engage in the investigation of the worth of brāhmaṇas but should give them food if they ask for it. The *Vāyu Purāṇa* (82.26-28) provides that the brahmanas established at Gayā by Brahma are supermen, that one should not embark on examining their family,

character, learning or *tapas*, that when those Gayā brāhmaṇas are grafified the Gods together with *pitrs* become gratified and the pilgrim secures *mokṣa*. The *Varāha Purāṇa* goes so far as to say that at Mathurā a pilgrim should prefer to honour a brahmana born and living in Mathurā rather than a brāhmaṇa who has studied the four *Vedas* (but is a stranger to Mathurā), since those men that dwell in Mathurā are like Viṣṇu. Hindu society has come to believe in the great merit of feeding brāhmaṇas and the *Purāṇas* only echo the general sentiments of people. If the people in general had not believed in this, I think no amount of interpolation or insistence by crafty brāhmaṇas would have been effective.

The *BaudDhS*, II.8.30, *Manu*, III.126, *Vasiṣṭha*, XI.28 contain the same verse which emphatically asserts that a large company destroys five *desiderata* viz. the respectful treatment (of those invited), the securing of a proper place and time, purity and (the choice of) meritorious brāhmaṇas and that therefore one shoule not desire a large company (of brāhmaṇas at a *srāddha*), yet several *Smrtis* and *Purāṇas* lay emphasis on profuse expenditure for *śrāddhas* at *tirthas*. The *Vāyu Purāṇa*, the *Viṣṇu* and *Varāha* expreassly provide that no stinginess lit, cheating in money matters) in spending wealth should be shown at Gayā.

Some of the *Purāṇas* draw a comparison between sacrifices and pilgrimages to and bathing in sacred places and recommend the latter in preference to the former. The *Matsya Purāṇa* says that sacrifices require numerous implements, collection of various materials, the cooperation of priests and therefore can be performed only by kings or rich people; but going on a pilgrimage is possible even for the poor and yields results equal to sacrifices and is therefore superior to sacrifies. These very verses and ideas occur in the *Padma Purāṇa* and the *Viṣṇudharmottara Purāṇa*.

In pursuance of the dominant idea of inculcating matters that are easy but yield great rewards, the *Purāṇas* speak highly of *vratas*. Thousands of verses in the *Purāṇas* deal with *vratas* (e.g. Agni, chs. 175-200, *Garuḍa*, 116-137, *Nāradīya*, I.17-23 and 110-124, *Matsya*, 54-80, 94-100, *Varāha*, 39-65). They were put far above *yajñas* as in *Padma*, III.21.29 and VI.96.25. Hemādri, himself a great minister of the Yādava King of Devagiri, wrote the *Vratakhaṇḍa* (of *Caturvargacintāmaṇi*) which contains descriptions of about 100 *vratas* to which over 2500 printed pages are devoted by him. It makes one very sad to think how even responsible Ministers of States, instead of devoting deep and constructive thought to the question of the driving out of ruthless foreign invaders of Bhāratavarṣa, spent time and energy in such matters as *vratas*, *śrāddhas* and *dānas* in the thirteenth century and thereafter.

Another great characteristic of the *Purāṇas* is that they lay great emphasis on *bhakti* and *nāmasmaraṇa* (taking for remembering the name of God). The *Padma Purāṇa* says 'even Pulkasas, Svapacas and Mleccha tribes if they are solely devoted to Hari, should be honoured'. The germs of the doctrine of *bhakti* may be traced even to the Rgveda (in the hymns to Varuṇa particularly). The word *bhakti* occurs in the *Svetā-svataropanisad*. But it is the *Purāṇas* that devote great space to *bhakti* (religion of faith in and love of God).

Many *Purāṇas* particularly the *Bhagavata* are replete with the eulogy, the theory and practice of *bhakti*. For reasons of space it is not possible to quote many verses from the *Purāṇas* on this subject. Because the *Purāṇas* often speak of the *bhakti* of Śiva or Viṣṇu or Kṛṣṇa or Devi and because they are full of stories of fights even among gods themselves, one should not run away with the notion that the real teaching of the *Purāṇas* is one of pure polytheism. The *Purāṇas* never tire of saying that there is only one God and Brahmā, Viṣṇu, Śiva are only suppositions imposed by men.

The *Purāṇas* lay great emphasis on remembering or taking the name of God. The *Vāmana Purāṇa* asks: "What has that man to do with many *mantras* who has *bhakti* for Janārdana? The *mantra — namo nārāyaṇāya* is able to accomplish all objects. Success is for those who have faith in Viṣṇu. How can there be failure for them in whose heart dwells Janārdana dark like a blue lotus?" Stories such as that of the sinful Ajāmila, who is said to have secured *mokṣa* (final liberation from birth and death) when on his death-bed he whole-heartedly called upon Nārāyaṇa (his son), were meant to emphasize the doctrine that a single heart-felt invocation of the name of God, a single act of faith and complete surrender to God cancels the results of a whole life of sin and iniquity. This is also the teaching of the Gītā in IX.30 'if even a very sinful man worships me with a single-minded devotion, he should be regarded as a saintly person, since he has resolved to pursue the right course."

The *Vāmana Purāṇa* (94.63) and *Padma*, VI.245.85 say that a man secures the same results by repeating the name of Viṣṇu that one would secure by visiting all the *tirthas* and holy shrines in the world. many persons often say that the doctrine of *ahiṁsā* arose in India owing to the spread of Buddhist and Jain teachings. This is not correct. That doctrine is inculcated by the *Upaniṣads* (*vide Chāndogys*, III.17.4 and VIII. 15 *ahiṁsan sarvabhūtānyanyatra tirthebhyaḥ)* and in the *Dharmasūtras* (*vide Gautama*, II.19, 23 and VIII.24 *dayā sarvabhūteṣu*, frequently in the *Mahābhārata*, *Ādi*, 11.13, *Droṇa*, 192.38, *Sānti*, 263.30, 266.6, 330.18, *Anuśāsana*, 115.25, 116.38 *Aśvamedhika*, 28.16-18, 43. 21) and the *Yogasūtra*. II.30 (*ahiṁsā* is the first of five *Yamas*). The *Purāṇas* very frequently eulogise *ahimsā*. The *Padma Purāṇa* again and again reverts to the doctrine of *ahiṁsā*. In one place it says 'men who kill animals do not reach Heaven even with all the *Vedas* (they study), nor with gifts, nor with tapas nor with sacrifices. Sages always say that *ahiṁsā* is the highest *dharma*, the highest *tapas* and the highest gift. Those men, that are compassionate, look upon flies, snakes, lice, stinging insects and man as the self (comparing all with himself); *vide Mārkaṇḍeya*, 25.32, *Brahmāṇḍa*, II.30.35, *Padma*, V.18.440, *Matsya*, 52.8 and 143.31-332. *Vāyu*, 59.43 (for compassion for all beings). The *Brahmāṇḍa Purāṇa* states: non-enmity, freedom from avarice, *tapas*, compassion for all beings, restraint of senses, celibacy, truthfulness, sympathy forbearance, patience — these are said to be the root of the ancient *dharma*.

Though *ahiṁsā* was very much emphasized, some of the *Purāṇas* were bold enough to say that if by killing one person many would live in happiness then there is no sin either great or small, in killing that person.

Manu (IV.226-27) divides *dharma* into *iṣṭa* and *pūrta*. The former is constituted by *Agnihotra*, *tapas*, truthfulness, preservation of the *Vedas*, hospitality and Vaiśvadeva (*Agni*, 209.3), while the latter comprehends construction of wells with steps, deep wells, tanks, *annasatra* (where food is distributed gratis) and the laying out of parks (*Agni*, 209.2). Some of the *Purāṇas* assert that by the *dharma* called *iṣṭa* a person secures heaven, but by performing works of charity *(pūrta)* he secures *mokṣa*.

Sometimes the *Purāṇas* give expression to ideas that strike us as very modern, because they raise social service and removal of distress and suffering as the highest *dharma*. The *Brahma Purāṇa* says 'that man's life is blessed who always strives for the good of others: fire, water, the sun, the earth and various kinds of crops exist for the sake of others and particularly the good'. The *Skanda (Kāśi-khaṇḍa)* avers: adversities vanish in the case of those good men in whose hearts doing good to others is always active and prosperity comes to them at every step. That purity is not secured by baths at sacred places, that reward is not obtained by numerous gifts, that reward is not obtained by very severe austerities, which are all obtained by doing good to others. After churning out all dicta this is the conclusion viz., 'There is no *dharma* higher than doing good to others and there is no greater sin that harming others'. In the *Mārkaṇḍeya Purāṇa* a king gives expression to a fine thought 'I think that men would not obtain that happiness in heaven or in the world of Brahmā, which arises by bringing about the deliverance of distressed beings'.

The last item that I would mention here is a surprising conception well in advance of modern socialistic doctrines: 'men should have ownership over only so much as would fill their belly; he who thinks as his own what is more than that, is a thief and deserves to be punished.'

PHALA-DIVYA

The Phāla divya, the eighth of the nine ordeals discussed in the Dh. works provides an interesting study. It is mainly developed by Br. and is definitely a later addition to the list of the recognized ordeals. According to this method, the person is required to lick a red-hot iron bar (Phāla).

The word Phāls is as old as Yāj. It must however be pointed out that though Yaj. has referred to it once in II.99 he does not give any details regarding its procedure nor does he include it in the list of the recognized ordeals given by him (II.95).

The Mit, has however identified this Phāla with the fire ordeal described by Yaj. This can be concluded on the following grounds (I) Explaining the stanza II.99 Mit. points out that 'Phāla, Tūla and Viṣa— as also the Jala which falls in between the ordeals referred to — should not be tried for the cases below 1,000 Panas,' It is thus clear that the ordeals mentioned in II.99 should refer to the ordeals already given in II.95, which means that Phāla of II.99 should be taken as Agni of II.95. (ii) It is interesting to note that after explaining the five ordeals given by Yāj., the Mit. has explained in a sort of an appendix, other ordeals also subsequently recognized and discussed by the later writers. These are

in fact four i.e. Tandula, Taptamāṣa, Phāla and Dharmādharmau, but the Mit. discusses three out of them dropping only one i.e. the Phāla. In fact there is no reason for dropping it, particularly when yāj. himself has referred to it. The obvious reason as why Mit. should have dropped it, could possibly be that it was not considered as a distinct method, but was identified with the fire ordeal. We must point out that Mit's this identification of Phāla with the Agnidivya has left an all-time effect on the Indian mind.

Essentially Phāla is an independent ordeal. It has a different form than that of Agni. This Phāla is developed by Br. Save a single line attributed to Pit. there is no other *Smrti*kara except Br. who has described this ordeal. The latter Dh. writers have however accepted the Br.'s Phāla as an independent method. We have seen that the SC has brought Agni, Taptamāṣa and Phāla under one head calling them as fire ordeals, but it only shows that all the three are in general related with fire. The SC itself treats all the three ordeals as independent ordeals. But VN is more specific and clear on this point. It has made a clear distinction between the Yāj.'s Phāla and the Br.'s Phāla. The latter is obviously the main Phala (mukhyaphla) discussed as an independent ordeal in the Dh. works. As regards to the former one, the digest points out that it is the same as Paraṣu (we have already pointed out that the Agni divya of *Dharmaśāstra* is essentially developed from the Parasu-divya of the Chāndogya Up. The Agni divya is thus often referred to as the Parasu divya also) while the latter is the Mukhya Phāla which is recommended for the lighter case.

The Phala as identified with fire ordeal was naturally used for the severe charges Viśvarūpa and SC have referred to this view, but the Phāla (developed as an independent ordeal) is used for lighter cases. In fact, considered from the cost point of view, Phāla comes last in the list of ordeals.

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There are no special rules regarding the time and place of conducting the Phāla ordeal. The general rules of time and place are therefore applicable to the Phāla ordeal.

PROCEDURE

BṚHASPATI

The Phala is made of Iron. It is 12 Palas in weight and is 8 Aṅgulas long and 4 Aṅgulas wide. The Phala is made red-hot. The thief should lick it once with his tongue. If the accused is not burnt, he is innocent, otherwise he loses it.

PITĀMAHA

(The accused person) desirous of licking the (red-hot) iron should be adked to do so by his tongue.

KAUMARIKAKHAṆḌA

Oh Dhananjaya! Listen to the procedure of the Phāla which I will now tell to you. An iron piece of 12 Palas' weight, 8 Angulas' length and 4 Aṅgulas' breadth is known as Phāla. The mantras given in the Fire ordeal should be (written and) tied on the forehead of the accused person He should be asked to rub his tongue upto 6 Aṅgulas on the red-hot Phāla. He should be given cow's milk to drink after the trial. This is the best method of conducting the Phāla ordeal. The tongue of the person should then be examined. If it is found burnt, the person is convicted. (Lit, not to be released) but if it is not burnt, he should be considered innocent.

The important stages in the procedure of the Phāla ordeal are: (I) Performing the general rites. (ii) Heating the phala. (iii) Licking it by tongue. (iv) Signs of the success or failure of the trial.

(i) performing the general rites

Digests like SC, VP etc. point out that all general rites beginning with the invoking of Dharma and ending upto tying of the Sirahpatra should firstly be performed.

(ii) Heating of the Phala

Heating of the Phāla should be conducted in a systematic way i.e. the fire in which it is to be heated should be invoked and established properly at the place of ordeal and then Phāla should be heated in it. The Prāḍvivāka should address the Agni by tbe mantra Tvamagne etc. The accused person also should it with the mantra 'Tvamagne sarvabhūtānām' etc.

(iii) Liking the Phāla

Kkh gives two important points as regards to the licking of the Phala. accussed person should rub his tongue on the Phala as long as 6 Angulas (whole Phala is 8 Angulas long) and should do it three times. Secondly, person should immediately be given cow's milk for drinking.

(iv) Signs of the success or failure of the trial

Signs of the success of failure of the person in the trial are clear enough If the person

is free from burning as such, he is innocent. He should be tal as guilty, if reverse is the case.

Phāla must have originally sprouted as a local variety in the mithila the North India in general, gradually getting prominent so as to catch the attantion of a *Smṛti*kara like Brhaspati who hailed from that region. 'The passage Gocaurasya Pradatavyam taptaphalavalehanam' iti *Smrti*riti Maithilag (sa dakalpadruma - sv Phalam) possibly goes to show that this from of Phala-divya was very popular in North Bihar and that brhaspati lived not far from the Mithali region, observes Mr. D.C. Sircar, who Furthr adds that 'This form of order appears to have been unknown in South India'.501

Phāla was a popular ordeal practised in many parts of the world. J. MacCulloch observes that the 'red-hot metal is of wide occurrence amo Arabs, Hindus and Chinese'502

The red-hot metal ordeal referred to by MacCulloch to be popular in India is obviously in its licking form. This is the Phala-divya described by br. doubt, but it is not of wide occurrence in India as referred by the scholar. The contrary, we find that it is the most neglected (or discouraged) ordeal India. Br. is quite isolated as far as its recognition is concerned. From practi point of view also, it is found very rarely account also shows the it was never favoured by the people. It was almost a dead method in India.

One of the reasons for such a development of this ordeal appears to be that it may not be a genuinely Indian ordeal, or must have rather come down to India through its contacts with the people of the neighbouring counties-say Arabs and Chinese among whom the ordeal is said to be popular.

In all its history, the ordeal has never been found really rooted in the Indian soil. We have already observed that it has been recognized only by Bṛ. It has been rejected by Mit., and though it has been included by the later writers in their digests, these writers have simply done the job of quoting Br. They have not offered or added any comment or explanation on it.

Now, it is rather interesting to see that this method is described by Yuan Chawang, the Chinese pilgrim in India, but we have to note that none of the ordeals described by him tallies with any of Indian account (Vide Ch. VII), surely not with the descriptions of the other Dh. ordeals. It is remarkable that the licking form which is described by the Chinese pilgrim to be the (Indian) fire ordeal has got place only in Br.'s writings.

Br. might have found it convenient to name this new ordeal inroduced, by the old traditional work Phāla passingly used by Yāj., which could support the new method with a possible identification of it with the traditionally established method-ordeal B fire. The old world Phāla serving as the title of the new method (Br. has in a newer context already defined what a Phāla means) thus worked both the ways—as a form, Phāla got established as an independent method, while a free scope for its continuous confusion and identification with the Phāla—the fire ordeal, was left open.

We find very rare instances of this ordeal. The example of grasping red-hot iron in

the presence of God Hoyasaleśvara recorded in 1309 A.D. would show that it gradually travelled in the South also, but in most of the cases we find that it has been identified with Agni and is practised in that form only. We may refer to the following instances. (I) Kittur inscription records one instance of the Phāla-divya, but from the description it is quite clear that the trial was conducted in the form of the Agni divya described by the Dh. writers. (Vide Ch. VII). (ii) Phāla divya witnessed by Mr. Ali Ibrahim Khan, Chief Majistrate of Banares, was also really the Agni divya of the Dh. writers (vide Ch. VII). (III) Phāla divya described by Mr. D.C. Sircar is also the Agni-divya of the Dh. writers.

These intances clearly show that the Phāla-divya was completely identy with the Agni-divya. Mit's idenfication of the Phāla with Agni had thus all-time effect on the Indian mind. Phāla-divya in its licking form as described by Br. was rather rearely used by the Indian people.

Referring to the differences in the views of different law-gives, D.C. sircar observes that "one of the most glaring instances of such differences may be seen in the views of Brhaspati on the eighth form of the nine divyas, namely the Phala-diviya" (The successors of Satavahanas p.367). *naiyāyikas* or logicians. But *mamedam* implies a *saṃbandha*, or "connexion", an invisible link or association. *Saṃbandha* is the word sometimes used for "marriage" or any kind of relationship such as kinship by blood or adoption, or paedagogical relationship, or civil subjection. Property, named a *saṃbandha* in so early a text as kautalya's phrase *sva-svāmi-saṃbandha*), was thus inevitably likened to social relationships, and it seems that there was some interrelation, as the rituals and mock transactions believed to be essential to the validity of marriages, adoptions, and so on, took on the forms appropriate to transfers of Property. Without pursuing this aspect of the story, it is evident that a considerable degree of abstract investigation must have preceded the discovery that between "me" and "my thing" there must exist a *saṃbandha*, of which there need be no concrete evidence, which makes the thing mine, and without which it would "belong" to no one, or at least to others than to me. For centuries jurists were content to take this *svā-svāmi-saṃbandha* as self-explanatory, to settle in what circumstances it might arise, and in what it would cease (above IV A iii, iv), and to leave the matter there.

PHĀLA-DIVYA (Ordeal by Ploughshare)

The Phāla divya, the eighth of the nine ordeals discussed in the Dh. works provides an interesting study. It is mainly developed by Br. and is definitely a later addition to the list of the recognized ordeals. According to this method, the person is required to lick a red-hot iron bar (Phāla).

The word Phāla is as old as Yāj. It must however be pointed out that though Yāj. has referred to it once in II. 99 he does not give any details regarding its procedure nor does he include it in the list of the recognized ordeals given by him (II. 95.).

The it, has however identified this Phāla with the Fire ordeal described by Yāj. This

can be concluded on the following grounds (i) Explaining the stanza II.99 Mit. points out that 'Phāla, Tulā and Viṣa— as also the Jala which falls in between the ordeals referred to—should not be tried for the cases below 1,000 Panas.' It is thus clear that the ordeals mentioned in II. 99 should refer to the ordeals already given in II.95, which means that Phāla of II.99 should refer to the ordeals already given in II.95, which means that Phāla of II.99 should be taken as Agni of II.95. (ii) It is interesting to note that after explaining the five ordeals given by Yāj., the Mit. has explained in a sort of an appendix, other ordeals also subsequently recognized and discussed by the later writers. These are in fact four i.e. Taṇḍula, Taptamāṣa, Phāla and Dharmādharmau, but the Mit. discusses three out of them dropping only one i.e. the Phāla. In fact there is no reason for dropping it, particularly when Yāj. himself has referred to it. The obvious reason as why Mit. should have dropped it, could possibly be that it was not considered as a distinct method, but was identified with the fire ordeal. We must point out that Mit's this identification of Phāla with the Agnidivya has left an all-time effect on the Indian mind.

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PRACRICAL V. TRANSCENDENTAL LAW

This brings us to the difficult and involved subject of the distinctions between injunctions to be found in the *Smṛti* literature. Any commentator has to determine whether a text which in fact conflicts with practical usage is valid and binding upon a court or a customary tribunal, or can be distinguished as a applicable only in a sphere uncontemplated by the suit in question. To clarify the position : in civil ligitation it might be argued that a *Smṛti* must be applied, as for example, to the effect that the transaction in question, having been recorded in a fashion which does not comply exactly with the requirements of *Smṛti*, is void and of no effect. Money might have passed, and the suit might be for the performance of the promise stipulated for. Since it would be manifestly unjust to deny relief to someone who was following usage merely to comply with a formality prescribed by the text, the court would seek to avoid the textual law, if not on an equitable principle, then at least because the text did not mean exactly what it said.

Likewise in marriage, where the texts recommend the selection of a girl who is not a close relation and who *has* brothers, there might be a dispute over a marriage in fact hold that the violation of the first rule would render the marriage void, whereas the violation of the second alone would not have had that effect. There are two categories of injuctions which have to be considered, though the categories overlap. The first is the category of "seen-ness", i.e. does the purpose which the text subserves relate to the seen world of perceptible causes, or does it refer to the unseen world in which effects arise out of causes in ways not knowable otherwise than through the *sastra* ? The second category is that of "sacrificiality". If the rule is directed to the fulfilment of a sacrifice (however indirectly) it is different in kind from one which is directed to the conduct of an individual (e.g. a sacrificer or other "actor"). The first classification of rules is into injunctions which are *dṛṣṭārtha* (directed to a "seen" object) and *adṛṣṭārtha* (directed to an "unseen" object.

We could say loosely that the first are "practical", the second "unpractical".

The second classification is between *kratvartha* injunctions (those directed to the sacrifice) and *puruṣārtha* injunctions. A breach of a *dṛṣta* rule involves no more than practical inconvenience. A breach of an *adṛṣta* rule involves usually nothing more than spiritual hazard. A breach of a *kratvartha* rule means that the *kratu*, the "act", comes to nothing — it is therefore an important rule; whereas a breach of a *puruṣārtha* rule affects the individual and will lay him open to the consequences, which, as the case may be, may amount to penance or fine or both if the circumstances permit. We may proceed to see how Medh. manipulates these distinctions.

It must be understood at the outset that a *Smṛti* rule which is not to be discarded for any of the reasons set out in previous sections of this paper must be given some force. If it is not *dṛṣṭārtha* it must be *adṛṣṭārtha*. The lawyers hold to the maxim that no *Smṛti* must be given an *adṛṣṭārtha* sense (which is in practice emasculating) if it is somehow capable of being given a *drstārtha* sense. In the *vyavahāra* sections of *smriti-s* one naturally starts out with the presumption that the rules are dṛstartha. Customary rules and bye-laws are all *drstartha*, though they may have *adṛṣta* overtones. But exceptions will throw light on the way the presumption works in practice. At Many VIII.33 it is said in the *Smrti* that thieves of lost property must be killed with the aid of an elephant. Medh. says that the specification of the elephant is *adṛṣṭārtha*. In other words the judge may order any other form of execution, while any penance he performs for failing to obey the *sāstra* will cover the spiritual fault of failing to use an elephant. Law works, as it were, upon wheels oiled by the judge's willingness to incur spiritual guilt (the present author's figure of speech).

At Manu VIII.223 the text says that after tendays from an agreement constituting a sale of an object the purchaser who is dissatisfied shall not return the object. It might be argued that it is sinful to return the object *even with the seller's consent*, which would certainly be the case if the text had an *adṛṣta* force. But in fact its force is merely *dṛṣṭa*, and the meaning is that the seller shall not be *compelled* to receive the article back again

and refund the price. Further at VIII.179 the text tells us that "The wise man shall entrust a deposit to one who is born of good family, is endowed with character, cognisant of the law, and truthful, has a large following, and is wealthy and honourable". What happens when the depositor chooses one who is not truthful, has not large following or is not wealthy ? Does it mean that the deposit is void, or that the incurs sin by so entrusting his property ? What force does the *Smṛti* have ? We should not be alarmed, says Medh., for the text is *advice* as it were to a friend, and is not an injunction at all, still less is it an injunction even of an *adṛṣṭārtha* character, as would be injunctions on how to perform a sacrifice. The advice is of good practical value, and he explains with an illustration how good it is. Other instances where no transcendental purpose (*adṛṣṭartha*) is seen could be multiplied in the field of litigation, but a final instance would serve. Manu prescribes precise relationships between the punishments to be awarded to culprits of various castes. Medh. Says that these prescriptions have no *adṛṣṭa* force (though the concept of punishment itself is, of course, mixed, with the consequence that the court is not in any sense bound by them literally.

Kingly duties appertain to *dṛṣṭārtha*. If the king performs them he gains a transcendental reward. But his function is purely practical. Therefore instructions given in *Smṛti* regarding penalties are *dṛṣṭārtha*, and lesser penalties may be awarded if they are effective for the king's purpose. But this does not prevent the *Smṛti-kāra*, such as Manu, adding an essentially *adṛṣṭa* force, for the purpose of emphasizing its obligatory character : but that will not render breach of the rule a spiritual offence as a matter of course, since the words are not to be taken in their literal sense: i.e. whereas at IX.327 Manu says that Prajāpati (Lord of Creatures) having created cattle, made them over to the Vaiśya caste (to tend) and an impression is thereby created that if others than Vaiśya (i.e. Sūdras) tend cattle they will be afflicted with supernatural penalties, in fact all that the *Smṛti* means is that the Vaiśya, if in fact he does tend cattle, must tend them in a particularly solicitous fashion. Still less could it be urged that Sūdras tending cattle are to be punished or that Vaiśyas are to be punished if they do not tend cattle.

So many examples have been given of the denial of an *adṛṣṭa* character. A transcendental purpose may however be seen in injunctions relating to etiquette, caste-behaviour. The *brahmachārī*, or religious student, having fetched fuelsticks is told, by Manu at II, 186, to place them in the air. If placing them in the air would have the effect of drying them no *adṛṣṭa* purpose is to be inferred; but if in many cases the removal from dense forest and placing in the open would have the opposite effect the only motive could be *adrsta*, and so some scholars opined. It would be possible to take action against a student who did not place his sticks in the air, but of course not in the king's court, only in a tribunal vested with jurisdiction in such matters. A nice contrast between the practical and the transcendental is to be seen at Manu IV.133-4. One should not pay attention to someone else's woman, and this prohibition is *dṛṣṭa*; one should not pay attention to another man's *wife:* this is both drsta and *adṛṣṭa*.

The importance of an *adṛṣṭa* command must not be underrated. That which is

commanded for an *adṛṣṭa* purpose may still be exacted in the appropriate forum if it is easily stirred into action. People may be ex-communicated, evidently, for failure to perform superstitious acts which the *śāstra* does not oblige them to do by any threat of civil or criminal penalty. That arises when the acts are intended for practical welfare. One is entitled to infer an *adṛṣṭa* command even in *Smṛtis* which are concerned with purely practical matters if, without the scriptural injunction, the person concerned would in any event tend in the same direction. An elder brother would wish to take a large share than his younger brothers (IX.153), the result is not that the *Smṛti* therefore has no injunctive force (see below) but that the *Smṛti* contains an *adṛṣṭa* force. Breach of the rule without the authorization of custom will therefore lead to penance, and the social sanction is thus ensured. Needless to say this method of interpretation would be considered controversial by *śāstrīs* generally today.

The conflict between the practical and the transcendental is like that which we have already noted between the legal and the moral. In the world of contractual relations there are many contracts which are prohibited or not recognized as legal by the *śāstra*. From the point of view of *dharma* they cannot be enforced and those that enter into them may be liable to spiritual sanctions. Excessive interest, sale of wife and children, gift of all property : these are the illustrations Medh. adopts. The transactions, though defective from an *adṛṣṭa* standpoint, may well have a practical effect.

Our final illustration may be taken from the law relating to suicide, which is rather special in that punishment for violation is hardly practical. The *śāstra* as expounded by Medh. does not flinch from dealing with the subject because the objections to suicide operated in a transcendental sense, so that the many suicides with which ancient India was familiar could lead, unless properly authorised by the *śāstric* system, only to Hell, for there would be no opportunity for penance.

The distinction between *kratvartha* and *puruṣārtha* is less common. At Manu VII.93 a set of *niyamas* or rules are laid down concerning enemies who should not be slain : "Nor one in distress, nor one severely wounded, nor one who is frightened, etc.". These interesting humanitarian provisions, in everyone's interest, one would have thought, become the object of controversy. What ill befalls one who breaks this commandment, and kills a terrified and unarmed enemy ? Presumably his military courts will not be in a position to punish him, even if they were disposed to do this, which is unlikely. If the *niyamas* were *kratvartha* (as might be urged by those interpreting the whole section in terms of the king's spiritual gains through honourable conquest, or war in defence of his people) failure to observe them would merely hinder the king's attainment of Heaven, which need not be a pressing consideration either for the king himself or his soldiers ! Therefore, the jurist determines that the text sets out a prohibition which is addressed to the hearer in his own interest, not mere advice, but a *śāstric* prohibition, of the *puruṣārtha* category, like the prohibition of eating flesh of an animal killed by a poisoned arrow.

Sources of Law

Enough has been said to show that the sources to which the judges must apply their minds are far more extensive than the *smṛti* texts themselves. Even in interpreting and applying those they must use skills of a character ancillary to the *śāstra*. But what does Medh. recognize as sources of injunctions which provide the starting-point in all disputes? This subject is involved and complex, and there is a superabundance of information. Any student of Hindu law knows that the Vedic texts take precedence, in a dispute, over any *Smṛti* text on precisely the same subject-matter; but that there is an obligation to obtain harmony if possible between *Smṛti*-s where they are discrepant. In *vyavahāra* topics the effort is not made so conscientiously or so confidently as in the non-*vyavahāra* contexts, in which, after all, the application of social or spiritual penalties took place in an atmosphere in which reliance upon *sāstric* learning might be more widely tolerated or encouraged. On *adṛṣṭa* questions the ultimate determination of the Brahmans might well be acquiesced in, whereas in questions of property such sources as the *Smṛti*-s were open to objections. It is likewise well known that when the act enjoined by the *Smṛti* was one which would be done even without an injunction the *Smṛti* had no coercive or injunctive force, it was merely reiterative, illustrative, or mere exhortation. But assuming that the act or abstention would not be instinctive or automatic, what fundamental standards determined the rule of law ?

One of the curiosities of Medh. is that he frankly admits that there are many sources of law which are not on the one hand instinctive, conscientious, or automatic, nor on the other hand Vedic or derivable from the *Smṛtis* or from custom which can be said to be based on lost Vedic or *Smṛti* material. Apart from legislation to which we have given a glance already and which will be mentioned in brief below, there are in practice many avenues through which injunctions may come, to which the individual is positively bound to give attention or to live at his peril. The mass of the *śāstra* repeats, like an incantation, that no conduct but that of pure Brahmans learned in the Veda can ever be a standard for anybody, but this was evidently not merely a counsel of perfection, but also a dangerous generalisation. For example, the student is to take lessons from the Sudra servant of his teacher on matters entrusted to the former. A stranger visiting a village he does not know, must find out what are the rules and regulations operating in that area, and cannot decline to receive warnings even from untouchables.

The attitude towards the *Smṛti* is cynical, and in places comical. No doubt Manu had access to materials not available to us and gave us the benefit of the relevant information from the Veda, but he was no more than a man, he condensed his material misleadingly, used unnecessary words to fill up his metre, and borrowed heavily from practical life, not to say from common sense, which in *vyavahāra* weakens the force of his injunctions. The attitude to custom attempting to derogate from the *Smṛti* is even more cynical. Widespread customs, like that of marrying the maternal uncle's daughter, spring from accidental origins. Deviant practices spring from greed or ignorance. Injunctions are valid

if they come from the practice of "good" people, but never if they emanate from the traditions of non-Hindu peoples or believes. A statement on *dharma* must always be authenticated by reference to texts or to a custom which can be approved in such a manner. An actual usage, so long as it is not objectionable, can be used to clarify what the law is. As for the relationship between custom and the *Smṛti*, the *Smṛti* may lie dormant, as it were, until the custom itself dies away, in which case the *Smṛti* becomes, in that region, for the first time obligatory! One of the uses of *Smṛti* is to show us what, upon that footing, can be done, since what the *Smṛti* prohibits is obviously in use somewhere! *Smṛti*s can be very terse : they obviously incorporate by reference local usages, some of which might have no similarity with the provisions in the text!

Political Power and the Law

In all this variety the one factor which has not appeared is political power, Judicial discretion, equity, scope for interpretation of texts, competition between sources of law, all these are evidenced; but there is no question of the king himself being a source of law in competition with the *śāstra*, nor could political advantage as such vary the sacred law or its method of interpretation. Yet, though the king's subordination to the law is repeatedly asserted, there were loopholes through which the administration of justice, and the nature of what we have called law, could be modified in practice, and Medh. was content that he saw justification for this modification even in *śāstric* theory.

The word *dharma*, as we have seen, can comprehend very diverse factors, *śāstric* and non-*śāstric*. Provided they were not contravening an undoubted *śāstric* rule local bodies, corporations, could enact by-laws or regulations which would be enforced with all the rigour of a *śāstric* rule to which no exception could be taken. The king was under a *śāstric* obligation to recognise and put into effect the resolutions of guilds, associations, sects. And for these classes of people an opportunity therefore existed to conspire against the remainder of the public, and from the great wealth that merchants were able to accumulate in ancient times (obviously with the royal sanction) it is evident that they were in the main successful. Medh. insists that while Manu speaks only of a judicial setting aside of gifts, mortgages and sales the king may in fact render void fraudulent devices by cultivators, traders and artisans which aim to subvert the public interest.

The demands we make upon law are these : it must be certain, ascertainable, intelligible, and suited to the needs of the people. We do not require that it look after our spiritual needs as well as our secular needs, nor that it take care of our social responsibilities as well as our financial. No doubt there was a time when government in Europe in theory at least attempted all those tasks, as the Hindus seem to have attempted during the whole of their known history. What does Medh.'s conception of law reveal as his demands upon the law ? To him it is clear that practicality was the first consideration, suppleness and ready adjustability to circumstances. These requirements were flatly contrary to the professed character of the Hindu jurisprudence, which, for all its very occasional references to enquiry and common sense, in fact tries to codify duty

in all possible spheres with all possible precision. Manu is an exception to the extent that he is vague and comprehensive in some of his more sweeping condensations and generalisations. The spirit of the *śāstra* is very far from the flexible and contingent standard which Medh. presents as Hindu law. If so many qualifications are to be applied before one can know what rule would be administered in a particular court — and we must bear in mind that an individual might have several tribunals before which he might be summoned to answer for his conduct — the law as a body of rules is no entry which can quality for the adulation and worship normally attributed to it.

The answer seems to be this, that the intellectual exercise was intended to achieve two results. First the supremacy and inter-regional character of the *śāstra* was to be upheld. The public believed in some supernatural forces, they only differed on what these were and what their effects might be. The *śāstra* purported to cater for all points of view which could be claimed as " Hindu". Secondly no kingdom could claim to be a Hindu kingdom unless the *śāstra* played some role in its administration of justice, and provided it played *some* role there was really no concern on anyone's part how substantial that role was or how pervasive the influence of the *śāstra* might be. This did no harm to the individual subject because, though the law was not certain and was barely ascertainable by the learned, let alone by the man in the street, he belonged to a unit, a family, clan, tribe, caste, or village, which would defend him independently of the merits of his case, and without whose support he was powerless how meritorious so ever he might be. Action would be rare at all times, in a country which has never ranked activity as such high, and mature deliberation and delay would precede any act. The approval of the authorities would be sought for almost any transaction of real importance, and the insistence on witnesses and documentary evidence is only a symptom of this subconscious desire to implicate as many people as possible in whatever was done.

The absence of a need for continuous development of the law (as opposed to the *śāstra*), for recorded precedents, for recorded reasons for judgments; the absence of need for juridical as opposed to *ad hoc* predictions as to what effects an act would have; the absence of concern about prejudice (despite the *śāstra's* fulminations on the subjects), bribery, corruption of other kinds; the absence of a concern for true justice as opposed to what would suit the majority of the influential persons involved; all these absence account for the confused and illogical, though in the circumstances eminently practical, jurisprudence which emerges from a study of Medhatithi's commentary on the *Manu-Smṛti.*

The Rights of An Illegitimate Son of A Sudra by a woman of a twice-born caste

In *Rahimtola v. Nizam of Hyderabad*, the House of Lords were divided upon a number of questions, most of which are not relevant to this article, but not the least interesting was the problem whether a Judge may found his judgment upon questions and authorities

not raised or cited by counsel and not appearing in the judgement of the Court of first instance or the lower appellate Court, if any. Lord Denning, characteristically, took the view that the Judge's responsibility was not confined to the path indicated by counsel, but the majority of his brethren indignantly repudiated this doctrine. Academic opinion is solifly in favour of Lord Denning's view for it seems obvious that there is a presumption that the Judge knows the law. The advocate's duty to rehease before him the authorities and arguments which existing legal knowledge provide and experience indicate is no substitute for the Judge's own obligation to persist with enquiry and research, so long as there is the slightest possibility that counsel's reactions to propositions put to them from the Bench may not have been maturely meditated, and that there exist authorities which might have a direct bearing on the issue in question but have not appeared in counsel's prepared briefs. The Madras High Court, if it had been asked this very question in 1870 or thereabouts, could have made only one answer : at that period Judges such as Mr. Justice Holloway were perpetually framing their judgments with reference to considerations drawn from a multitude of quarters, many of which must have been, at their first citation from the Bench, a surprise to counsel. The Judge at that period felt free to cite Roman, French, German and other laws from his private library and if counsel would keep pace with him he must be an agile linguist as well as a legal philosopher.

It is unfortunate that in a very recent case a division bench of the Madras High Court, Panchapakesa Ayyar and Basheer Ahmed Sayeed, *J.J., in Velu Niranjan (Minor) v. Alagammal and others* misstated the Hindu Law on a point which is, though not covered by direct authority, so plainly dealt with in cases upon closely analogous points that it is virtually settled law. Since the legal position of the parties to that litigation will be severely affected by the misstatement, and since similar cases may arise in some numbers, it is desirable that the error should be pointed out at the earliest opportunity. The error was, of course, due to counsel's failure to make the correct responses to questions from the Bench.

Slightly simplifying the issue for convenience of exposition, the question we whether the plaintiff was an heir, and might, after the death of the surviving spouse, be the sole heir and trustee of P, a Hindu make, a Sudra by caste. The learned Judges decided that the plaintiff would be the sole heir, and that he already had a very substantial interesting the estate of *P*, his father. This, it is respectfully submitted, is incorrect, for in the circumstances as found *P* died intestate as to a large portion of his estate (part of which was subject to trusts for religious purposes), leaving his widow, a legitimate daughter and the plaintiff, his son by a woman who was not his wife but had been in his keeping for six years and more, and had been in his continuous keeping at the time of the plaintiff conception. The plaintiff was thus a *dasiputra* of a Sudra. But since the mother was a member of the Kshatriya caste, the unfortunate lad was not merely illegitimate, but also the issue of areprobated union, a *pratilomaja*, for his mother was of higher caste than his father. Their Lordship rightly held that no marriage between the parents would have been possible at the time (this war prior to the enactment of the Hindu Marriage Act), and that the pathetic ceremony at which the father-to-be tied a *tali* round the neck of the Kshatriya lady who was to be the plaintiff's mother was no marriage at all (notwithstanding

its taking place in a temple, and, presumably in the presence of at least one witness) : for such a ceremony could be equally consistent with an intention to commence a concubinage, and no custom supporting marriage between castes in this order had been proved.

It is well known that the *dasiputra* of a Sudra can in certain circumstances claim a share, or even the whole of his father's caste or could so claim if his father died before the coming into force of the Hindu Succession Act, 1956, which abolished the *dasiputra's* privilege. As their Lordships remark, unions between persons of different castes were becoming more common during the decades preceding the enactment of the 'Hindu Code', but the Hindu Law itself did not prove elastic enough to permit such unions without the aid of stature. Custom occasionally assisted the parties, but disappointment is all too-frequently traceable in recent case-law. A marriage between a Kshtriya woman and a Sudra man was void, and the issue illegitimate : but a question arises as to whether a son of such a union would be a *dasiputra* within the meaning of Yajnavalkya II, 133, and as such capable of inheriting from his father or partaking in the joint family property. In three places in their judgements in *Velu's case*, the learned judges repeat that the plaintiff was entitled ultimately to one half of the estate as against the widow and the daughters. The assumption was, no doubt, that the Hindu Women's Right to Property Act, 1937, was not applicable and that question will not be raised here. In their view the illegitimate son of a Sudra by a *dasi* of the Kshatriya caste was a heritable *dasiputra*. But this is not correct. Counsel appear to have omitted to cite *Datti Parisi Nyudu* v. *Datti Bangaru Nayudu", Ramachandra v. Hanam Naick and Mahabir Prasad v. Raj Bahadur Singh.* Reference was made to the Privy Council decision in *Kamalammal* v. *Visvanathaswami Naicker.* But it was not observed that their Lordships in that very case cite texts (which they misleadingly say were not of governing authority in Madras—whereas they had been relied upon in *Datti Parisi Nayudu·* and were thus authoritative even for Madras) which showed how the fundamental text of Yajnavalkya was understood, and which make it clear that the Sudra's illegitimate son by a concubine of a twice-born caste is totally excluded from succession on intestacy.

In *Datti Parisi Nayudu v. Datti bangaru nayudu,* the principal question was whether an incestuous bastard could inherit from a Sudra father. In negativing this proposition their Lordships refer to the *Dayabhaga* of Jimutavahana, the *Smriti-chandrika,* and to Jagannatha's *Vivadabhangarnava,* otherwise known as *Collaborate's Digest*. Some of these text make the general proposition namely that the son of a *pratiloma* marriage can never inherit, though he may be maintained. Others point out that the *dasiputra* of a Sudra must be the son of a mother of the Sudra caste. The *dasi* is regarded by the *dharmasastra* as the 'unmarried wife' of the Sudra for this limited purpose, and it is therefore quite legitimate to discover the meaning of the fundamental text of Yajnavalkya with reference to texts bearing upon the inheritance-claims of children of void marriages. In our case, the ceremony was no marriage at all, and even if the ceremony had been perfect in point of form it would not have affected its validity. If the sons of marriages void for *pratilomatva* are excluded it follows that the sons of Sudras by kept concubines of a higher caste are

excluded, and this provision is an exception to the wide terms of Yājñavalkya's text. As if to eliminate any possibility of doubt Jagannatha says:

"Consequently a son by a female slave, not superior in class to her Sudra master shall obtain the moiety of a full share. Such is the opinion delivered in the *Mitakshara and Ratnakara*". It is comforting to find in this context that there is no difference of view between the two major schools of *Dharmasastra*, the Bengali and Maithili authors adopting the same attitude and applying the same tests. In *Datti Parisi Nayudu* their Lordships say, upon the authority of the texts, that the son of a Sudra by a twice-born woman would be excluded from participating in the inheritance of his natural father. With respect, this is perfectly borne out by the authorities they cite, and has been confirmed by the judgement in *Ramachandra v.Hanam Naik.*

In *Ramachandra case* the question was whether the illegitimate son of a Sudra by a Brahmin concubine could inherit. It was held by Divatia, J., that he could not. The difference between a Brahmin concubine and a Kshatriya concubine is now negligible. The fact that the issue of a Brahmin woman and a Sudra man is a *chandala*, but that of a Kshateiya woman and a Sudra man is less loathsome in orthodox eyes is no longer relevant. At one time it was felt that the *dasi* ought to be a slave, but that view, retained for some time in Bengal, was abandoned in Madras as early as *Muttusamy Jagavira v. Venkatasubha Yettia*, and has no relevance except in so far as the fact that a Brahminn could not be enslaved being well known to the *dharmasastris,* it was obvious that a Brahmin woman could not *at any period* have been contemplated as the mother of a heritable *dasiputra*. But this point has never been of importance since it has been accepted on all hands that the *dasiputra's* mother might be free to leave her paramour at any time after the son's conception. *Ramachandra's case* is therefore virtually on all fours with *Velu Niranjan's case,* and ought to have been cited in argument. That the non-Sudra *dasi* could not be the mother of a herigable *dasiputra* is accepted without question by the Privy Council in *Kamalammal's case* though there the question was only of the size of the share available for a genuine, heritable *dasiputra*.

Thus it is submitted that the plaintiff was not interested in his father's estate beyond the right to maintenance for life, to which any illegitimate son of a father of any caste by a mothre of any caste is entitled, once his paternity is established. The position in the case of the estate of one who dies after the coming into force of the Hindu Adoptions and Maintenance Act, 1956, differs but we are not concerned with that problem in this context.

Prohibition and Nullity :

A jurisprudential Lacuna

Every legal system requires a mass of prohibitions, and it may be a source of confusion to some of the lay public (who tend to think of law rather in terms of 'must nots' than 'musts') that it has this feature in common with a concurrent system of ethics. The

confusion will be worsened if a great many prohibitions appear, perhaps in slightly different guises, in both. The human mind is quick, however, to discover 'what you can get away with', and in practice the distinction in modern times between a legal and a moral or ethical prohibition is well understood. There is indeed scope for holding *quod fieri non debuit, factum valet.* There remains a difficulty neverthless, when in a purely legal context we attempt to discover the effects of a prohibited act, and the distinction between a void and a voidable transaction is of immense importance and is consequently eagerly detected. Provisions, again, in legislative enactments may appear to inhibit the acquisition of a particular status, and yet the law that results from their practical application may stop short of denying that acquisition, whatever penalties may incidentally be exigible from the individual who has attempted to acquire the status illegally.

But whatever the remaining problems in our own and contemporary systems, the fundamental difficulty was much more acute in countries and periods when law was emerging from a pre-legal era, that is to say when 'must nots' and 'musts' were becoming the concern of the community as judge rather than of the same community as priest, when superstitious and sentimental sanctions were not strong enough to give injunctions almost automatic efficacy amongst adults, and the opinions and feelings of the community had deliberately to be put into operation by devising and regulating penal sanctions. At this critical stage in human development—a stage perhaps of immense duration in certain societies—prohibitions are investigated, rationalized, and classified, and subtle distinctions may be drawn between the prohibited act which is valid in law and the prohibited act which not only draws vengeance upon the perpetrator but is otherwise legally ineffective. Although it would be a mistake to suggest that traces of these efforts are not to be found in many societies—for indeed to this day the Canon law perpetuates rules bearing unmistakable traces of the stage we are discussing—there is much interesting material in Sanskrit which seems to have been neither closely nor sympathetically investigated. It is the purpose of this article to summarize the manner in which the Indian jurists of the period stretching from the sixteenth century to the commencement of the British period attempted to meet the requirements of the fully-developed legal era for which they were catering.

Discussions of this sort show the *dharmaśāstris* at their best, and it is high time that specimen of such work, the fruit of profound thought and wide leaning, was made available to a non-Sanskritist public. It may be suggested that it is a great many years since Colebrooke published his translation of *Jagannātha's Vivāda-bhangārnava*, in which a very lengthy investigation of this problem is to be found; and it may be added that if *Mahāmahopādhyāya* Dr. P.V. Kane has not given much attention to the matter in his *History of Dharmaśāstra* it has at least been treated in outline by the late Dr. Priyanath Sen in his *General principles of Hindu jurisprudence.* The present writer does not believe that this excuses him from enering into the subject once more, since Jagannātha's work, meandering and leisurely as it is, still requires an introduction, and is coloured by a characteristic 'Bengali' bias; while Priyanath Sen was satisfied to lay out the bones of the

matter, to adopt Jagannātha's analysis, and somewhat complacently to accommodate the result with what he considered were fundamental and universal principles of jurisprudence. He seems unaware that he was observing a remarkable example of rational creation, and indeed his main object was to show (as was far from unnecessary in his day) that the Hindu law could stand comparison with foreign systems.

Our story commences with the *Smṛti* texts, few of which need be dated later than the second century of our era and all of which were treated as binding authorities by the medieval jurists. Amongst the mass of negative injunctions we may at once discard those which are not capable ofleading to the conflict in which we are interested. Examples are the injunctions against saying 'hum' to one's teacher, against touching an untouchable, against eating the leavings of another's meal, and against passing water in a river. Injunctions against marrying a woman of the same *gotra* and against marrying before one's elder brother or elder sister as the case may be are indeed of the kind in which we are interested, for the question arises whether marriages contrary to the injunctions are valid, voidable, or void. But it is more convenient to pass on to a list of injunctions of a purely financial implication, and we may revert to the preceding question in our conclusion.

Various *Smṛti*s prohibit :

(1) acquisition of assets otherwise than according to a set of rules (devised caste-wise by Gautama and others for normal and emergent circumstances);

(2) acquisition from a person who has taken something either (i) not given to him or (ii) not lawfully capable of acquisition by him : in other words from a thief

(3) acquisition by acceptance by a Brahman from a candala (outcaste)6;

(4) acquisition by acceptance upon the banks of a river

(5) acquisition by acceptance of a ewe, etc.;

(6) alienation of land by sale;

(7) alienation to B of what has been promised to A;

(8) alienation by gift of all one's assets;

(9) alienation of common assets;

(10) alienation of son or wife

(11) alienation of ancestral assets without the consent of male issue, except under exceptional provisions of law; and

(12) alienation of assets in respect of which one is bailee or mortgagee.

This list is not exhaustive, but its five prohibitions of acquisition and seven prohibitions of alienation serve our purpose adequately.

In some cases the *Smṛti*s specifically provide that anyone who transgresses the

probihition shall perform a penance, or incurs sin (which comes to the same thing). The implication to the unreligious whose situation is such that outcasting need not to be feared for practical purposes is that he may act as he chooses : failure to perform the penance would in the cases of other people involve serious social and perhaps legal consequences, but he can 'take a chance' with his spiritual welfare, for his status in the next or other worlds or lives may not interest him. The ancient pre-legal sanction is thus useless, and the prohibition a mere *brutum fulmen.* In other cases the *Smṛti-kāra,* evidently alive to the difficulty, prescribes a punishment for transgression of the rule. The one who contemplates wrongdoing is now taking a heavier risk, and the prohibition so armed, is as near to being effective in one sense as many prohibitions can ever be. But will he take his chance, undergo his punishment, pay his fine (or whatever it may be that is inflicted upon him), and then feel satisfied at having achieved his object, even at such a price ? This might not seem unattractive to a rich and powerful wrongdoer. The prohibition is thus only half-armed after all, and we need to know whether the act completed by the wrongdoer will be legally valid notwithstanding the penalties prescribed—for if the actual invalidity of the act is not stated in so many words the implication might well seem to be that it is penalized, but none the less operative. Here it is very rare for the *Smṛti* to be explicit Indeed it is only where the obnoxious present is still legally the property of the outcaste, or the common assets still remain within the ownership of the whole body of co-owners, or if the Court may grant a decreein such terms, that the prohibition has really done its work. Common sense tells us that unless a prohibition is well-armed it might as well be omitted; and although it is perfectly true that procedural limitations control the persons who may question an act and the time within which they may do so, in order that innocent third parties may be protected, and it is necessary to stipulate carefully in what circumstances as act may be treated as void *ab initio* and thus capable of being ignored without resort to litigation, it remains evident that ambiguity in the terms of a particular prohibition is capable of being more radically fatal to its efficacy. Now Sanskrit, with its habitual employment of the optative mood, which may lead to translations of a single term as varied as 'he shall not', 'he should not', 'he may not', and 'he must not', directly encouraged ambiguity of such a kind. Moreover the perhaps fortuitous omission of details of penance and punishment for breach, not to speak of rules regarding nullity, if any, lent ample opportunity to commentators and digest-compliers to make the distinctions which they knew from practical experience were vitally necessary.

It is interesting that the discussions did not start in real earnest until the twelfth century (if so early. Up to that time, and indeed in important instances until long afterwards, jurists were inclined to assume that if an alienation was forbidden it was voidable, i.e. capable of being set aside at the suit of an interested party· This was often very invonvenient, and therefore even from the late *Smṛti* period conditions began to be fastened upon the words of the rule in question so as to make the prohibition consort more happily with common sense and usage. These authorities then forbade one to give

away all one's assets when one had a family to maintain, or so long as its maintenance had not been secured already; similarly to alienate common assets without the consent of co-owners or in the last resort except to the extent of one's own undivided interest therein: or to alienate one's son or wife unless in the former case a specific textual authority could be called in aid or unless in either case property without the consent of male issue unless the latter were already divided in interest from the alienor. But this type of tinkering only touches the surface of the problem, leaving us in the dark about the exact effect of a transgression of the now limited prohibition, while it in any case leaves many prohibitions untouched. The problem was complicated by the fact that usage varied from district to district, and what was an acceptable transgression in one part was shocking in another.

Our authors were eventually obliged to turn their attention to the real problem : were transactions in defiance of prohibitions voidable or, on the contrary, valid ? Three schools of thought emerged. According to one the transaction is valid, but the transgressor sins and is perhaps liable to punishment, depending upon the case. According to the second the transaction is voidableand the transgressor does not sin. The third opinion holds that the transaction is voidable and the transgressor does sin and is liable to punishment in an appropriate case. The handiest summary of the argumens leading to the first opinion is to be found in Jagannātha. His text is unfortunately not in print, but Colebrooke's translation is extremely reliable. The second opinion is not found independently, but is represented in the text of the best source for the arguments supporting the third view, namely Sankara-bhaṭṭa's *[Dharma-]dvaita-nirnaya* (c. 1580-1600). This work contains, as one of its miscellaneous collection of *questiones*, a most acute investigation of the topic *dattāpradānikam*. Commencing with a rehearsal of the basic text on adeyatva ('ingivability'), and accepting as correct the statement of Vijñāneśvara (c. 1125) that *adeyatva* is based partly upon the absence of Property in the alienor in respect of the object and parly upon the force of the prohibition, Sankara goes on to select for special consideration the most crucial as well as tha most difficult instance, that of the gift of an object promised to another, a gift *prima facie* in the poser of the donor because of his remaining, as Vijñānesvara pointed out, owner despite the promise. An extract from his treatise is given below with enough annotation to make it intelligible to the non-specialist. The original may be found on pp. 123-4 of Principal J.R. Gharpure's edition, Bombay, 1943. A very handy summary, unfortunately married by some needless errors, may be seen in the *Dvaita-nirṇaya-siddhānta-sangraha* of Śankara's grandson Bhanu-bhatta, who is to be congratulaed at any rate upon having concentrated on our extract, which is undoubtedly the best part of the passage. The extract from Śankara now follows.

In this context we may consider whether, when a gift is made contrary to the prohibition, 'That which has been promised to *A* shall not be given to *B*, the donor sins, merely, while the Property of the donee is effected; or on the contrary Property is not effected, neither does the donor sin. Now the fact is that he does indeed sin, while Property is *not* effected.

1. It is suggested that Property must be effected, since gift cannot be completed without the production of the Property of another. Moreover gift on the one hand and acceptance on the other are two entirely distinct operations; consequently just as, in the case of one who makes an acceptance in contravention of the prohibition against accepting a ewe and so on, the gift materializes, since *gift* as such is not prohibited, so though it is gift that is prohibited our context and we are confronted with a donor notwithstanding the prohibition, the effecting of Property in no way inconsistent with the prohibition since the perfecting of the transaction is the act of the donee and his acceptance is not prohibited.

Furthermore, admitting that, comparably with the effect of a prohibited acceptance of a ewe, etc., there is in our context no inconsistency in the effecting of Property by means of a gift which happens to prohibited ; yet the donor sins, merely. This must be so, for it would be nonsensical for the subject-matter of a prohibited proceeding to be under restraint, without the act in question itself giving rise to sin. But this brings us to the following distinction. In our context mere gift is indifferently prohibited. But both sorts of gifts are comprehended, that which is secular and directed to a 'seen' object such as a gift to a friend and so on, as well as that which is directed to an 'unseen' object, being to a technically indicated recipient, whether the gift be regular, purposive, or purely voluntary, such as a gift by a *dīkṣita.* So far as concerns the gift of a non-technically enjoined character all the prohibition tells us is that transgression gives rise to sin. But where a technically enjoined gift is in issue there must be a basis for restraint, since the reverse would involve a contradiction, and consequently restraint is implied in information that there is no basis for proceeding. Inevitably the only information to be obtained in such a case is that there is no possibility of achieving the desired object which was to be expected from that act and that act alone. And this is a permanent state of affairs, for we can never escape from the position that the absence of a basis for restraint would be an absurdity. Indeed should any persons, despite their evidence of the unattainability of the desired object (which is laid down in the texts and was to be expected accordingly) none the less decide to preceed to their own satisfactions under the impression that somehow or other that very desired object may be achieved, it is impossible to restraint them.

If the prohibition does *not* tell us of the sin incurred in transgressing it, then it follows from that assumption that it does not even convey what has already been shown above. One might perhaps object that it is false reasoning to deduce a comprehension of the absence of possibility of achieving the desired object which is expected, a comprehension which is produced first, from the comprehension that sin will be achieved, a comprehension which is produced afterwards. But this is not true, since it would be absurd to posit an absence of a basis for restraint comparably with a regular rite. In fact whereas one individual may proceed because of the possibility of achieving the desired object which he expects, another may desist from fear of achieving sin as the fruit of his prohibited act. In such circumstances as these an absence of a basis for restraint, upon the lines of

a regular rite, is totally precluded. It is therefore established that in cases of enjoined gifts what is revealed by the prohibition is as much the absence of the possibility of achieving the expected desired object as the fact that what is achieved is sin. Accordingly the donor who gives to *B* what he has promised to *A* sins, merely, while be virtue of the donee's acceptance the Property of the later is effected. So much for the first point of view.

2. According to the second viewpoint Property is *not* effected, while the donor does not sin. What happens is (it is argued) as follows : The 'effecting of Property' is not an integral component of the sense of the root 'to give', so that the completion of gift causes the 'effecting of Property' in the donee; but the *accomplishing* of Property in him is a constituent of the composite entity, gift, being an operation functioning in a manner conducive to the 'effecting of Property', identical with the process commencing with 'designation of the donee' and comparable with the act of relinquishing the object given. By contrast the 'effecting of Property' is the fruit of this operation, being a distinct entity, like the Heaven and the rest. Consistently with this we may conjecture as follows : where a gift is made in contravention of the prohibition Property is not effected.

But, merely on the ground that this is established by conjecture only, we must not employ the Maxim of Scope, by positing an 'unseen' purpose in the rule where a 'seen' purpose is perfectly possible. And as a general rule positive and negative injunctions which are found in a *śāstra* appertaining to practical affairs are to be understood as having only a 'seen' object; and accordingly we are not to posit any sin here. As for the suggestion that, just as with a gift despite the prohibition of acceptance of a ewe, etc., so here, should an acceptance come about notwithstanding the prohibition of gift, Property is effected; and therefore just as there is no obstacle to the effecting of Property even by a forbidden acceptance of a ewe, etc., so there is none to its being effected by a forbidden gift : that argument has been refuted already in the words commencing, "And as a general rule........' In fact just as in our very context the rule, 'What has been promised must be given', is a rule concerning gift which is not directed to an 'unseen' object, but is directed merely to the effecting of Property, so this prohibition of gift is purely for the purpose of the non-effecting of Property : for the *śāstra* containing it is a practical *śāstra*. So much for this view.

3. We come to our conclusion. In the case of the rule, 'What has been promised must be given', just as in any case where a punishment is prescribed, the quality of belonging to a practical *śāstra* is to be found, and accordingly the element of direction towards a 'seen' object is certainly present; nevertheless, by reason of the assumption of sin in the one who fails to give, the element of direction towards an 'unseen' object exists too. Thus, in the rule prohibiting the making of a gift of what one has promised to another, a restraint, along the lines of a regular rite would be an absurdity. Indeed just as one individual may proceed to his own satisfaction in regard to an act of thieving, which may serve to feed him and so on, although it cannot produce his own Property; so another may proceed to his own satisfaction in the gift of a promised object, which cannot produce the Property of the other party. Where an individual is proceeding to his own satisfaction

in taking such an object, just as in a case of theft, an absence of basis for restraint upon the lines of a regular rite is precluded, in order that he may be placed under guard or otherwise prevented. Consequently the donor's sin is posited.

The great merit of Śaṅkara's treatment of this important question lies not in the novelty of his conclusion, for it coincides with that of another outstanding *Dharmaśāstra* author, the editor-complier of 'Pratāpa-rudra's' *Sarasvatī-vilāsa* (c. 1500-25), but principally in its concentration upon the true criterion for solving the problem. It was not satisfactory to fasten upon linguistic clues in the *Smṛtis* themselves, nor to draw assistance from the presence or absence of explicit penance-or punishment-prescriptions in association with the individual prohibitions. No assistance could be sought, as the author of the *Smṛti-sāra* thought and even Vācaspati-miśra was inclined to believe, from the definition of Property itself. It was only partially satisfactory to divide the prohibitions against alienation into two categories, those in respect of owned, and those in respect of unowned assets, and to characterize alienations of the former as valid and those of the latter as void : for this provided no answer to problems of prohibitions of other sorts. Nor could the rule of thumb suggested by Jagannatha and gratfully adopted by Priyanath Sen, namely of treating *adeya* ('ungivable') grants as valid and *adatta* ('ungiven') grants as void, be of any further assistance, if it could indeed help us so far. In fact the only satisfactory criterion is whether the prohibition (to adopt the sastri's language) occurs in a *vyavahāra-śāstra* or not. The more modern of the *Dharmaśāstras* contain a large, and in some cases a strikingly preponderant volume of *vyavahāra* material, that is to say, of material directed to the assistance of the King is solving disputes. The remainder of the work is usually given to *ācāra* ('conduct') or *prāyaścitta* ('penance'), and a quantity of treatises are concerned almost exclusively with these. Rules found in such sections were intended to be applied in a pre-legal environment, and continued until recently to be applied if at all as extra-legal rules. An offender might be poycotted in the last resort, but practical affairs, in the civil law, were not affected by his transgressions : no means of nullifying the practical consequences of his prohibited act had been devised. The prohibitions in the *vyavahāra* ('civil law') section came into another category : they were devised in an atmosphere which assumed the King's ability to 'put things right'. Non-*vyavahāra* rules in a *vyavahāra* setting, and vice versa, could be detected by applying the test, 'Has the rule (merely) an "unseen" object ?'

Consequently prohibitions (1) to (5) in our list, together with prohibition (6), though it isnot quite comparable, coming as they do in non-*vyavahāra* contexts, are prohibitions which do not invalidate transactions in breach thereof. The same criterion applies equally to the prohibitions we have cited regarding marriage : the faults of the parties do not invalidate the marriage. But prohibitions (7) to (12) ar alike in appearing in a *vyavahāra* context—even though some *Smṛtis* prescribe penances for breaches—and they are therefore alike in rendering transactins in breach thereof liable to be declared void. This conclusion will not suit a follower of Priyannath Sen; it is not consistent with the traditional Bengali solution of such problems; it implies that a bare promisee has an interest, however

inchoate, in the promised asset (which is difficult to admit, but far from impossible); and it obliges us to scrutinize every prohibition more carefully in case any further exceptions can be fastened upon it. But it has the merit of avoiding irritating and artificial distinctions between transactions which the *Smṛtis* treat together ; and, moreover, the *Smṛtis* being after all historical documents as well as law-books, it pays to history the tribute that is her due.

POPALAR ASSEMBLY

The earliest period of historical India is the Vedic period. The polity of that period can be made out with some difficulty, since the Vedic literature hints at it only in passing. Assemblies of a popular character existed, in which it appears both men and women participated, and there is no reason to doubt but that the government of the tribe at all levels was popular, the chiefs being appointed by, and exercising their functions under the authority of the popular assembly. It seems also clear that for some purposes an assembly of warriors, and for others a joint assembly of warriors and elders, would exercise government. When, long afterwards, settlements in agricultural areas were numerous and established, a form of government retaining the popular principle was on existence. The age of the Buddha (c.500 B.C) knew republics as well as kingdoms, and these republics had a form of government which was aristocratic from the point of view of the entire population of the area, but democratic from the point of view of the governing class. The method of governing the Buddhist *saṅgha*, which was taken from contemporary governmental techniques, reveals a tradition of democratic forms, of participation by the public in the making of decisions by the rulers, indeed, it approaches elemental democracy. But already by the age of the Buddha popular participation in government had declined with the extension of the public in vast areas, the elaboration of a complicated onterrelation of time-consuming occupations, and the experience (evidently over centuries) that kingly rule was successful and necessary. When Alexander the Great invaded India both forms of government existed, republican, whether aristoctatic or oligarchic, and monarchical. The greater efficiency of monarchical institutions seems even by that period to have been recognised, and it is not surprising that the ensuing period of the Mauryan emperors saw the beginnings, if not the finished product, of the school of *artha-śāstra*, of which the vast and complex text-book of Kauṭilya is the best-known example in which monarchy is taken for granted as the only typically Indian form of government.

The ruling classes — and Indian populations were already divided according to occupation and function by Alexander's time—had already resigned priestly, snd perhaps most of the academic, functions to the caste of Brahmans (originally 'medicine-men', specialists in sacrificial formulas, and not confined to a hereditary caste) who from then onwards monopolised writingınif nit discussion, on the sciences mentioned above. Their long contest with the Buddhists, who for at least a thousand years after the death of the Buddha asserted the right of all classes to education and to intellectual participation

in public affairs, ended eventually in the absorption of Buddhism as a living religion once again into Hinduism, and the extinction of specifically Buddhist learning in the fields that concern us. Similarly, other heterosox sects cutting across caste divisions, such as the Jainas, made their own contributions until the middle ages, and then fade from the scene.

At the time of the Mauryas it is evident that a class of administrator was developing. We are not entitled to assume that administration was a hereditary occupation so early as the third century B.C., but from the tecommendation that officers should be chosen from families which had already served the king in administrative posts, a recommendation which is found throughout the literature, it is plausible to conjecture that with emperial, highly concentrated and somewhat centralised government came the discovery that as there were no academies in which the practice (as opposed to the theory) of government could be taught, and as there is no apprenticeship so good as apprenticeship at home, hereditary acquainance with the nature of responsibilities might very well lead to hereditary aptitudes. This theory is amply borne out by our experience with Brahmans, whose hereditary aptitudes were, to the dismay of their non-Brahman compatriots, soon put to use in verey un-Brahmanical contexts during the British period. Groups, even as early as the Maurya period, must have emerged with a special interest in and capacity for administration. But the mass of the public was not concerned with major matters of policy. Details of administration beyond the village-polity or family level were never, so far as we know, the concern of popular gatherings.

Mediaeval India, though not so highly organised, continued in the same theoritical, tradition. In practice organisation was less thorough, empires were samller and more fragile, and stability generally less certain. The public, the 'ruled', showed more or less indifference to a change of rulers. Our inscriptional evidence, which from the fourth century A.D. onwards provides an increasingly comprehensive check upon the theoretical literature, supports the prevailing doctrine, namely that the task of the king was to rule, and that this task was not to be shared with others. Nostalgic references to non-monarchical organisations appear, suggesting that these were more than memories. Possibly artistocratic or even popular societies survived during this period, but we hear very little of them. Certainly the hill and forest tribes, which had their chiefs, must have been in practice democratic, the chiefs acting as the public's servants (as with our reconstruction of the Vedic age), for the same is found to this day amongst the Scheduled Tribes. But classical Hindu literature does not take account of the *antyajas*, the fringe populations. The literature speaks of the king, a theory so well embedded that the word *rāja* is not displaced by that for emperor, except in specific contexts, and with the arrival of the East India Company the Governor-General and Council were referred to by Hindu scholars as *rāja*, as they were the *de facto* 'king' of their Indian subjects.

The theory of monarchical rule implicitly eliminates popular participation. The *prajāḥ*, the 'subhects', are related to the king in a number of ways, each of which excludes parity between them. The *rāja* looks after the spiritual needs of the kingdom by exercising his

special priestly functions, without which fertility and security will be endangered. The relationship between the earth which the subjects cultivate and the *rāja* is depicted as a mystical relationship symbolised by human marriage. The subjects must obey, and must feed their *rāja*. Certain classes, particularly Vaiśyas, exist primirily to perform this function of feeding their wealth being available for the replenshing of the royal treaury. There was a kind of natural bargain between the ruler and his subjects, to the omnioptent rule of *dharma* ('rightrousness') and it was not an equal bargain. The ruler must it is alleged, satisfy the subjects. He pleases them by providing them with safety from external attack, and by 'romoving thorns', i.e. purging the kingdom of thieves, vagabonds, and the like, and principally by keeping the reign of *dharma* intact. This in principle meant the effectuating of an extremely complex balance of forces, preventing the development of new castes or classes by irregular intermarriages, preventing the increase in non-traditional occupations by the various castes, preventing all deviations from the established order of life, and so not allowing one group to progress at the expense of others. This extremely intricate task, well beyond the powers of even the most competent modern administration, but not altogether outside the aims of a modern Indian government, was indeed the imposition upon society through the *rāja* of a concept of a theoretical character emanating undoubtedly from society itself, fragmented and competitive as it was. But it was the negation of popular participation in government. The *rāja* was needed precisely because the public could never directly attend to the task of repression and balance, often as we find the subjects of relatively weak rulers attemting to do this.

While the groups which made up the public could bring pressure to bear upon the *rāja*, his sacral functions and transcendant duty towards *dharma* enabled him to keep his distance from all of them — a fact facilitating his task of maintaining the established order. Every element of self-government was within the framework of monarchy, and for even village headmen were appointed by the king, and the notion that a group could determine its own future without reference to the *rāja* was foreign to the Hindu outlook. There may have been legally or *de facto* 'self-governing' bodies, particularly where central government was wanting : but there was no government by the 'public' as such. What participation there was extremely indirect, and only conclusive on the very rare occasions of a rebellion, when one *rāja* was substituted for another. There are no examples of monarchy being overturned and replaced by an asistocracy or obligarchy, or democracy, or indeed by any Indian variant or version of these non-monarchical forms. Republics were, as we have seen, virtually dead before our literature commences.

The notion that India was a land of oriental despotism is easily traced, when we see the facts being analysed and described by the earliest European visitors. These were unaware of the functions of courtiers, and of the pressure exerted by sections of the public ; they were dazzled by the poverty of the mass of the people supporting a vast conspicuous expenditure of the part of the *rāja*. In fact the checks and balances of Indian political life kept most *rājas* within reasonable bounds most of the time, and the doctrine that *dharma* was the king whom the *rāja* himself must obey was asserted without shame

or fear throughout the historical period. The king has power to do what he wills, but whether he should will it, and what will befall him if he attempts to act contrary to the public's concept of *dharma* are questions that will be ventilated, and decided upon before the apparently boundless powers are used. Indeed the *rāja* is expected to act, whether or not he has ascertained the possible reactions of the public or any section of it : but then it is assumed at the commencement that he has been thoroughly indoctrinated as to his role as the spiritual and secular 'father' of his people, and when he is in doubt he has specialist advisers who can tell him what *dharma* requires, a criterion above that of the public's convenience.

European rule led eventually to representative and finally responsible government. The public still retained the idea of *sirkar* ('Government') as a personality, as a kind of *rāja*, even though its decisions might be those of an instable and partial group, whom party-politics had thrown to the top. The public, through its elected representatives, has acquired an indirect voice in national as well as local concerns. This development was the more ardently desired because the fruits of power were visualised as the natural privileges of those whome the *rāja* trusted, and who, for the time being, were able to utilise the immense authority which the royal service conveyed. It would be false to suggest that now the *prajāh* have become *rāja*. The true position is that the subjects (now the 'lower classes', 'lower orders', 'peasantry' and so on) as distinct from the classes having access to power, are ruled by a more complex *rāja*, not more unpredictable that the traditional *rājas*, who disappeared in 1950, but more inexorable, more pervasive, more demanding, and more burdensome. The quarrels between those who have acquired access to power are concerned in reality with the competition between them, which is nothing new, but they are all agreed that the 'lower orders' exist to be milked, just as the *rāja* was taught that the subjects, and their sources of production, existed as the natural 'food' for their ruler. Majority rule now enabes the voters to obtain directly and indirectly attention to public complaints of a kind not formerly likely to obtain a hearing ; but in the process devastating legislation is passed in furtherance of vast and, some think, visionary schemes, in which the aims and objections of the inert multitude obtain no recognition. The ruthless, planned, motion forward of modern governors in India is in striking contrast to the timid and unprogressive attitude of previous rulers, to whom the comfort and stability of the majority was more of an aim than the remoter prospect of their systematic 'uplift' and improvement. As with everything else Indian, the past casts a shadow over the present, and where the public attempt to participate it is always subject to the reservation that what the *Sirkar* ultimately decides is important must be respected, and this strengthens the hands of those who have sectional, regional, or purely selfish aims to prosecute.

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REPRESENTATIVE GOVERNMENT

Direct government by the public can be posited for the Vedic period. Amongst the republics in northern India assemblies of the entire governing body were known. But sections of the population probably had no direct representation there. Government by assembly direct is otherwise unknown in India.

Representative government as such was introduced by the British, first at the local government, and finally at the provincial and central level, in very gradual stages. Modern India has adopted adult suffrage and representative government at all levels.

Representation of the public during mediaeval times is, however, very widely evidenced. But we must not misunderstand the nature of that representation, or its motives. From our texts themselves we obtain information about regional entities (we can hardly call them 'corporations') which could voice local opinion, and which enjoyed some identity, notwithstanding the conflicting interests and diverse origins and ways of life of the groups that made up the population. The phrase *paura-janapada,* 'citizens of the cities and population of the rural areas', and even the word *janapada* itself, which conveys the notion of a district, show that the public, in some vague sense, were a force to contend with, and not a mass upon which a tyrant might play as upon some orchestra. From our inscriptions, as well as from the legal texts, we learn of the common activity of villages, paying revenue, entering into contractual relations with neighbouring villages, joining with other villages of the district to achieve some common object, settling disputes or taking steps to have disputes settled. Not only villages, and even hamlets, are spoken of as acting in these and other ways. The neighbourhood, the sub-division, the district, the country, and rarely (and in poetic terms) the nation are all spoken of as acting, deciding, achieving something, or suffering something. In all these contexts, even the poetic and imaginary ones, *representation* is unquestionably envisaged.

Within the village the families were represented by their heads, castes and sub-castes

by their natural leaders. A village council, consisting of a group of natural leaders, would speak through a small group, or natural head. Many such heads would meet, but our evidence suggests that they went to the meeting with others who, without diminshing their representative faculty, supported them and assisted them in their role. Such a meeting spoke in the name of the unit, whether it was the district, in some matter affecting a locality, or a major caste, in some question relating to caste discipline, morality, or way of life. Evidence of cooperation of many such units, such cross-categories of the population, is ample for the South of India, and we have no reason to doubt its existence in the North likewise.

The intimate blend of religion, caste, land-tenture, revenue, politics, and foreign policy in India made it impossible for any governmental action to take place without attention to the web of peressures and interests that any Indian population must create. No king could function without knowing what degree of cooperation could be obtained from the bodies, categories, cross-caterogies affected by his plans. To take an example : suppose a rich merchant wanted to leave a memorial to his own wealth (i.e. success) and piety, and favoured the construction of a dam across a valley for the irrigation of his native territory. To flood part of a valley would require considerable administrative activity. To obtain the labour and materials for the dam would likewise mean some disturbance of existing arrangements. It was not merely a question of laying out money. Much goodwill would be needed, and many jealousies must be overcome. The merchant could get his village on his side, and the villages which would be benefitted by the proposed irrigation scheme; but there would be some likelihood that the revenue demand for that villages would be increased, and that possibility would have to be investigated. The inhabitants of the valley above the proposed dam would have to be resettled, and this would involve quarrels with the inhabitants in surrounding areas. The delicate balance between families and even sub-castes would be disturbed, and a great many consents would have to be purchased. Even gods, whose temples would be submerged, would have to be pacified with suitable alternatives. All this would be the task of the king, delegated to his civil representative (who might also be the military governor) in the area. If more than one area were affected two such governors would have to cooperat. At various stages public meetings would be held in which the proposal would be discussed, and a decision made (if possible). The scheme tight as before the disruption was mooted.

In the interminable consultation and bargaining all groups which were at all concerned would have their say. Even the untouchable castes, whose leaders could hardly form a common committee with the leaders of the 'clean' castes, would be able to exert pressure; since the withdrawal of their labour would make life intolerable for all, particularly the Brahmans, whose prestige was highest and whose access to power was always shorter, if not always more decisive that of lower castes.

Nowhere was participation by the public completely absent. Even when the king decided to lead or send an army into his neighbour's territory the success of the expedition depending in some measure upon the inhabitants' willingness to find food,

fuel, and fodder for the army, and if they heartily disapproved of the scheme they could frustrate his plans, and their cooperation was by no means to be taken for granted, notwithstanding the sacral aspect of kingship and the glorification of war — the question of revenue was the ultimate test of lyalty, and we know that every trick in the king's power was tried before a frank raising of the rate of land-revenue was resorted to. Though the public did not decide upon the size of the revenue demand from an area (this was determined by the kings' ministers) their resistance to demands and insistence upon custom as the arbiter in such matters was a force with which those ministers were perpetually wrestling.

We may now approach some of the terms for a meeting of leaders to determine something. The word *sabhā* is ancient, ubiquitorus, and of various implications. The *sabhā* (which survives in the words Rajya-sabhā and Lok-sabhā for the two houses of the Indian Parliament since 1950) was a deliberative body. Only since the British period have such bodies had a definite constitution. In earlier times sabha existed for recurrent purposes, or ad hoc. In the texts we are told that the king must have a sabha to advise him. With the king or his deputy added to it the sabha became both advisory and, indirectly, executive. This is particularly to be noted in juridical matters, though the rule that the ruler must have a 'court' in such connexions seems not to have been obeyed in all parts of the country at all times. In pre-British times a *sabhā* was properly constituted if it contained properly qualified people, whose views were likely to be objective. The subject of ministers *(amātya, saciva, mantri)* is different, but the recommendations of the *śāstras* as to the qualifications of ministers and members of a *sabhā* had similarities. For the *sabhyas* who acted as assessors in judicial work and their qualifications see Kane, op. cit., 272-3, and did not exclude personalities whose consent to the ultimate decision would have been desired by a substantial group in order to give it validity in their eyes. The *sabhā* thus had a 'Datural' membership, based ultimately upon the acceptance and respect of the public, or the parts of the public that would be affected by the decision.

The *pariṣad* was an expert committee. The origin of the word is obscure. Perhaps it implies a committee sitting around their chief. It is found in various contexts, e.g. a *pariṣad* of Brahmans to advise authoritatively on law, or of ministers or officials to advise the king. Other names for comittees or public gatherines are found. In all cases, we suppose that consultation, and decision are implied, but where the body concerned is advisory it was naturally left to the official who was being advised to make up his mind. The leaders' judgment was respected, and was binding upon those whom they represented, but there is no trace whatever of a rule that the king, or any of his deputies or ministers should be bound by the advice of any committee or public meeting.

Many consultative bodies were of great age and required no authorisation from the ruler in order to be convened. In mediaeval times we find traces of a notion that a representative of the ruler should summon a meeting, or be present at a meeting in order to lend some prestige to the proceedings and, if possible, weight and decisiveness to the decision, if any, to be arrived at. District, professional, or caste meetings could be held

at the summons of the leaders or headmen of the caste and without royal command.

We often hear of the 'district', which was in a sense permanent, but permanent bodies as such did not exist. Members of a *sabhā* were called *sabhāsad(s);* the term does not imply permanent, or any other long memership, since the qualifications could be lost, often unpredictably, as by an indiscreet proposal, and confidence could be withdrawn from below, or a better-equipped rival could oust the former representative. In modern India by contrast the members of the central and state legislatures have tenures limited by the constitution. The traditionally- minded assumed that membership should be for life, unless the representative disqualified himself by indiscretions; but equally strange to them is the principle of election.

Designation of members of consultive and executive bodies was by birth only in the early republics of which we have spoken, and to the extent that membership of a caste was by birth. In later times, that is to say in the typical Hindu polity, age, character, prestige selected the 'natural' leader. No voting to elect a member took place until the introduction of this notion by the British. The ancient arrangement still survives in caste-councils and *panchayats,* which by no means always coincide with the new statutory, elected *grām-panchayats* and *nyāya-panchayats* that function in the same areas. The traditional *panchayats* still function in matrimonial matters, attempting to reconcile spouses who are estranged, and ultimately, if necessary, granting them divorces. The hostility with which such divorces, and the traditional procedure by which they are granted, are viewed by the established courts (which are necessarily largely Anglo-Indian in tone and outlook) as evidence of the clash between the 'old' India and the 'new' which finds expression even in this field. Like the ancient *pariṣad* the modern traditional *panchayat* may well amount only to one 'expert' in whom the public should, for the limited purpose in hand, repose confidence.

The Reaction of Philosophy upon Law

The Naiyāyikas had no "axe to grind". The discovery that Property was not a *guṇa* but a *padārtha,* or category of existence, was independent of any desire to produce particular juristic effects. But the doctrine, for all its advantages over the *saṃskāra* theory, had grave disadvantages of its own. For example if Property is a category, and is created by gift independently of acceptance, and I give X an elephant, and before X can communicate his refusal the elephant does damage, who is responsible)? Our writers speak of the problem in terms of gifts by *caṇḍālas* to Brahmans. All are agreed that no definition of gift can be satisfactory that would permit the Brahman's Property to arise under any circumstances. The question of the ownership of the bull released in the *vṛṣotsarga* and doing damage is another problem (see above, n. 79). The jurists and logicians co-operated to see whether Property might not be a category without these and similar disagreeable conclusions following). The test topics were (i) causation of Property; (ii) destruction of Property; (iii) the effect of partition of a joint family (somewhat bedevilled by failure strictly to separate Bengali and Maithila or Mitākṣarā legal doctrines);

(iv) the wife's alleged Ownership in her husband's estate; (v) change in constitution of the thing; (vi) gift and acceptance; (vii) creation of metaphorical "Properties", e.g. of gods, ancestors, etc., and the public. It is quite impossible to say which theory best stood up to these tests, since the legal positions were themselves not entirely concrete, and it was possible to restate them in such terms as to make the theories seem about equally plausible. As we have seen, the range of transactions involving *svatva* was exceptionally wide in India, and as a result the number and variety of tests to which such an apparently simple theory must be submitted were great.

The work of the logicians is evident in the legal writings of mitra Miśta, Kamalākara, Nilakaṇṭha, Sri Kṛṣṇa Tarkālankāra, Jagannātha, Anantarama in his Vivāda-candrikā, and others. Their chapters cannot be understood without the background which we are now studying. The study of *Dharmaśāstra* was made thereby even more esoteric and more difficult for the European reader: but the standard of juristic writing was improved by the contact; and that the *naiyāyika* doctrines were enlivened by the mutual instruction which was involved can admit of no doubt.

In the chapter which follws the student of jurisprudence would naturally expect to find a full statement of the reasons which led the authors to settle their definitions of Property, and the manner in which the definitions, as settled, led to the various solutions of the test problems. This is not possible. With very few exceptions, such as the Vivāda-bhangārṇava, *Svatva*-vicāra, and *Svatva*-rahasya, there are insufficient copies available to provide critical editions of the texts; even in the cases of the last two works grave doubts remain as to the text in some difficult passages, since the copies vary markedly. Even assuming that a perfectly sound test could be settled, the language in which these works are written is, if capable of translation, quite unsuitable for use in such a survey as this). It will be seen that the Naiyāyikas are using a jargon of their own, and to the extent that the *dharmaśāstris* follow them they are compelled (as we are) to utilise the jargon. To convert it into readable English is almost impossible, and to retranslate into language meaningful to comparative lawyers would be to destroy the mode of thought and obscure the logical procedure which the authors adopted. Hence, while it is possible to give and to explain their results, and to interpret them roughly with sufficient accuracy for practical purposes, a grave disservice would be done to the history of Indian logic if clumsy double translations were attempted; and the result would be of much less value to comparative lawyers that full translations, accompanied by technical introductions and a running commentary, which is a desideratum and may become available shortly. The examples that follow illustrate the position: they are both extremely mild examples of the technique.

(Extract from Mathurānātha's Nyāya-Līlāvatī-Prakāsa-Rahasya)

caitrasyaivedaṃ dhanam ityādau anyasya yoga-viśeṣaṇatayā nvayaḥ caitrānya-svatvābhāvavat caitra-svatvāvaccheda (ka)ṃ dhnam ity-anvaya-bodhāt.

"In cases such as the notion, "This asset belongs exclusively to X,' there is a proposition by conjunction by conjunction-qualifierness of another person, information obtained from the proposition being that 'this asset, possessed of the absence of Property of others that X, is the limitor of X's Property'").

(Extract from the *Svatva*-rahasya, III, 21)

caitrasyaivedaṃ dhanam ityādav anyasya yoga-viśeṣaṇatayā nvayaḥ naṃ prati carama-prāṇa-śarira-saṃyoga-dhvaṃsātmakasya maraṇasya viśeṣaṇatā-viseṣa-sambandhenābhāva eva śarira-niṣṭhatayā hetur lāghavāt. na tu kvāpi jivanam hetuḥ.

"But in reality, as a general rule, by relation of describerness the absence (by particular qualification relation) of death, which has the nature of a final extinction of the union between spirit and body, is the cause, through locatedness in the body, of that which is limited by Propertyness: for this is "light" [i. e. logically direct, involving fewer assumptions]. And never is *life* a cause (of Property)."

The definition of *nidhi* given elsewhere served as a warning to the present writer). The text is nidhitvañ caupādāniketara-svatva-sāmagryabhāva-visiṣṭa-svatva-nāśavattve sati svatva-sāmānya-bhāvatvam; pavana-gaganāder upādānāt pūrvam āraṇyaka-puṣpādes ca nidhitva-vāraṇāya *saty* antam; vikrayādi-janya-svatva-nāśot-patti-kṣaṇe nichitva-vāraṇāya *visiṣṭāntam.* "And nidhi-ness is the presence of the generic character of Property in a case where there is possessedness of the extinction of Property qualified by the presence of totality of Properties other than that of the finder. The phrase beginning "in a case where" is for the purpose of excluding *nidhi*-ness in air, sky, and so on, and in forest-flowers, etc., prior to their being appropriated. The phrase beginning "qualified" is for the purpose of excluding nidh-ness at the moment of the production of the extinction of Property due to sale and so on...". In working out the "algebraic" formula which contains the definition, he made a slip: one who is not a specialist in *navya-nyaya* jargon may easily do so, since the relationship between the words which are strung in a series with a minimum of caseterminations is seldom clear without a grasp of the entire background to the discussion, which roams far beyond law; and each author has his own variety of jargon and his own pet refinements of definition-technique. The value of this present study would be much diminished if close attention were drawn to the thought-processes of the logicians and their lawyer pupils at the verbal level — for that is an exercise best undertaken independently. We might then perhaps shorten the period of training which was needed in India to master the jargon, and give the western student the impression that he shares a method of communication which, when at the height of its prestige, was available to a few hundred of India's intellectual élite, and is now intelligible to perhaps a score of person. Meanwhile we must concentrate on what

puzzled the authors about Property, what conclusions they arrived at, with occasional reference to some tests they used to prove their conclusions, and why they stopped short of better definitions, of which one will be suggested (upon Indian lines) by the present writer).

Raghunātha Sirmaṇi

Raghunātha was the *enfant terrible* of the *navya-naiyāyikas*). The distribution of entities between the categories did not suit him, and a great number of new *padārthas* (called *atirikta* because he made them "additional" entities) were detected. His methods were peculiar, but at first sight they have much to recommend them in our particular connection. He says): —

> "So even *svatva* is an additional *padārtha*. If you say that it is 'fitness for use at pleasure', I ask, 'What use is that?' If you reply, 'Eating, etc.', I deny it, for that may happen even in respect of some one else's food, etc. If you reply that is forbidden by the *śāstra*, I ask, 'What *śāstra* have you in mind?' If you instance the text, 'Let him not take the sva of another person', I ask, 'How can that operate when there exists a non-cognition of *svatva* itself?' Consequently *svatva* must be a distinct entity. And proof of its classification lies in that very text, 'Let him not take the *sva* of another', and other such texts. And *svatva* is produced by acceptance, appropriation, purchase, death of ancestors and other predecessors, and is destroyed by gift, etc. The creating of the relationship between cause and effect is due either (as I believe) to the single-efficacyness of several causes or (less probably) to a generic difference between the effects."

This new *padārtha* is *dhana-vṛtiti*, i.e. has the property itself as its locus. We should not be misled by Raghunatha's "reason". It is true that he finds it convenient to detect a circularity in the old definition, because non-legal application of property has to be excluded by rules themselves referring to Property. But his real objection to the *yath*-theory is evidently its subjectivity, and its reference to the exercise, or likelihood of exercise, of a particular *adhikara* by the owner. To him yath-must be referred to *svatva*, and not *vice versa*, and this relationship between the two ideas is carefuully explained by Jayarama. *Svatva* is created by "transactions", and is destroyed by "tranactions"; it is capable of objective observation, because when you look at a thing you can actually say, 'I am looking at my thing'. Knowledge that one may apply the thing at pleasure is the cause, not of Property, but of observation of Property in the thing. Actually what occurs, he says, is not physical observation of Property, but apprehension or inference of it.

Unfortunately there is no end to these *padārthas*. *Navyā-naiyāyikas* have use for abstractions of abstractions, and Raghunātha himself would not have denied that there must be a *padārtha* called *svatvatva* "Propertyness", and indeed such an entity is utilised in discussion at a later date.

The difficulty with objectivising Property and locating it in the *dhana* is that it does

not cover cases where *adhikaras* certainly exist, as we have seen, because the thing exists, but there is at the relevant moment no means of knowing who is *svāmī*. In practical shape this objection appeared forcefully in connexion with undivided inheritances. If five brothers have five definite *svatvas* located in one fund there would seem to be nothing to prevent alienatin independently of one's one-fifth and creating an immediate title in the alience, but which fifth will it be. That owners could alienate property in which they had ownership seems to have been generally admitted, and this was applied equally to undivided brothers; if alienation was *forbidden*, that tended rather to support the possibility. But the controversies in Raghanandana, Sri Kṛṣṇa. *Sv. Vic., Sv. Rah.*, Jagannātha, and Anantarāma seem endless. Early British administration vaccilated and finally reverted to Jimūtavahana. If it is the fifth that will be allotted to the alienor at a subsequent partition is he not alienating a non-existent entity (which is not acceptable)? Moreover if *svatva* is a *padartha* and gift destroys it, and acceptance creates it, what happens in the interval? To posit that the king has a right to punish a thief of what is *asvāmika* seems hardly to solve the puzzle. There can be a theft of what is no one's Property. In that case, of course, theft is not what Jimūtavāhana for example thought it was, namely, the consciousness that "this", which has been taken, "is not mine but another's". The alternative, to posit a residual ownership in the donor.)

Reaction against Raghunātha

a) *Ultra-objectivity* Annaṃ-bhaṭṭa had no use for Raghunātha's theory). *svatvam api* he says, *na padārthāntaram. yatheṣta-viniyoga-yogyatvasya svat-varūpatvāt. tadavacchedakañ ca pratigrahādi-labdhatvam eveti.* Property is not another category, for it is a *rūpa*, "form", "appearance", (i.e. a *guna*, or quality of a thing) of fitness for application at pleasure. Fitness for application being a quality of a thing, and *svatva* being merely a quality of that quality, there is no necessity to assume that Property is any separate entity in itself. And the distinguishing characteristic of *yath-*, of which it is a *rūpa*, is the fact that the *dhana* was acquired in a particular legal way, and so on. The law determines the limits of *yath-*, and discussions of Property must concentrate on what those limits are.

This pegging of *svatva* to *yath-* does not satisfy us. The property may be improperly used, property of others may be used without justification, or no question of use, application, or enjoyment may arise at any particular moment (the analogy withthe seed having grave limitations). Perhaps *svatva* is that, by means of which transactions legally occur, and enjoyment is legally obtained by the owner even when he is not transacting anything with its aid? One suggested that it was *dānādi-janaktva*, "begetter-ness of gift and so on"). But what if no gift, etc., is contemplated—is there then no *svatva?* Another suggests *vyavahāra-viṣyatva*, a definition which apparently appealed to the acute jurist Kamalākara: "the subject-matter-ness of legal transactions", or, more intelligibly, "the capacity of the thing to facilitate or effectuate transactions such as sale". Here we are back again at the capacity difficulty; but the definition had many adherents. *yatheṣṭa-viniyogopāya-*

krayādi-viṣayatva was an attractive suggestion: "subject-matter-ness of the means whereby application at pleasure occurs, such as purchase, etc.", or "the capacity of a thing to be the means whereby purchase and other examples of application at pleasure occer". Our *navya-naiyāyikas* fall upon this eagerly; if that abstract character inhered in the nature of Property, one would in practice have Property in something before one had bought it, etc., since it would be serving the function (as literally described) at the moment when it was leaving the ownership of someone else in order to enter one's own. This sort of subtle objection would not occur to one unused to Indian logic.

The last attempt to evade the category theory appears to have been that cited by Rāmabhadra and Raghudeva in their commentaries on Raghnātha Siromaṇi). *kecit tu*, it went, *svatvaṃ nātirktaṅkintu kvacid vikraya-prāgabhāvaa-viśiṣṭa-kraya-vināsaḥ, kvacid dānādi-prvipratigrahādi-dhvaṃsaḥ, kvacid vikraya-pr- vi- pitrādidhvamsaḥ svatvam:* "Property is no additional category, but, sometimes the destruction of purchase qualified by the prior-non-existence of sale; at other times the destruction of acceptance, etc., qualified by the prior-non-existence of gift, etc.; and at other times the cessation of the father, etc., qualified by the prior-non-existence of sale". This is taking objectivisation to its furthest limits. It cleverly avoids the need for a special category, and the difficulties connected with application at pleasure; but unfortunately implies once agiain the likelihood, or possibility, of alienation, and fails to distinguish the Property of one from that of another — and there are other objections. The virtue of the attempt, however, lay in the concept of prior-non-existence, *prāgabhāva*, and in the logical theories of the duration of causation.

There was a moment when purchase ceased, and this moment continued until infinity, for a subsequent alienation would not destroy the purchase which had taken place. If however that completed purchase were qualified by the absence of alienation which invariably precedes an alienation, in that particular idea lay, it was thought, Property. Every single transaction involving disposal of the *dhana*, and every acqquisition being followed sooner or later by some sort of alienation or disposition, the history of the two transactions, acquisition and disposition, could be so syncopated logically that there would be myriads of *svatvas* with reference to myriads of items, and each would be its life-history partly in retrospect and partly in prospect: and this syncopation, or logical statement in terms of a "prior-non-existence" of the future event, would be Property itself. It is as well that flaws were found in this, for otherwise the author, would have been in danger of that despair of the logician, the perfect definition.

b) The "potentiality' theory: śakti, etc.

Upon this, in default of adequate documentation, it is imppossible to enlarge. Kamalākara,, who, as we have seen, favoured another definition, likewise treated this with respect). His relative Nīlakaṇṭha-bhaṭṭa, a very distinguished jurist, preferred to define *svatva* as a *sakti*. He was well aware that Raghunātha himself defined Sakti as a further category. but that seems not to have deterred him. He says):

dāyādi-nirṇayopayogi svatvaṃ, tacca kraya-pratigrahādi-janyaḥ sakti-viśeṣaḥ. tat-kāraṇatā tu krayādīnāṃ loka-vyavahārād eva gamyate, na sāstrāt.

Such Mimāmsakas as were not prepared to see *svatva* as a *saṃskāra* must have found this agreeable. Popular usage enabled a man to know whether what he had transacted created *svatva*; and *svatva* was "a particular potentiality, taking its origin in purchase, acceptance, and so forth, and tending to serve legal investigations such as into the nature of *dāya* and the like". The *sakti*, "power", "potentiality", evidently resides in the *dhana* itself, since it is by means of it that passing a coin buys an object. This accords with a curious passage in the Mitākṣarā, in which the author reveals in a characteristic negative statement that he believes that it is through the *svatva* of the thing, and not through the thing itself that transactions such as purchase and the rest are effectuated.

This approach has its drawbacks. It implies that Property is to be defined in terms of what may lawfully be done with a thing that in *sva*. Yet it is evident that many things may be done with *sva* which are not lawful, and that indeed its application need not at any particular point involve a "power" or "potentiality" at all, as for example the case of *upekṣā*, where only what is *sva* can be abandoned, while the process of abandonment can hardly be described as being achieved though a *sakti*.

(c) The "impression" theory: saṃskāra

In view of what Jagannātha Tarkapañcānana and his pupils wrote in the last decade of the 18th century it is impossible to suggest that the *saṃskāra* theory (VI ii) was ever defeated. To trace Property to a state of mind, an impression once created, and likely to be recalled by the operation of memory, was much more realistic than the category theory, and less purely intellectual and ultra-objectively unattractive than the theories described above (VI iii (a)). However, the documentation on it is thin, and we have only one satisfactory text upholding it, the Svatva-vicāra, and fragments of the views of the author's colleagues.

The steps in the proposition are important. *"mamedam" iti jñāna-viśeṣa-janya-saṃskāraḥ:* "An impression (or faculty) begotten of a particular knowledge in terms, 'it is mine'". The *saṃskāra* comes from the knowledge, which is not of acquisition, or of having acquired, but that, after all, that is mine. It is not the knowledge that "that is X's", for the impression created by knowlege that X has acquired is nothing to the point, Similarly, it is true to say that the knowledge is created by the circumstances of acquisition and *svatva*, as a samskāra, lives on, until it is destroyed by a contrary and inconsistent knowledge, namely that "this is not mine, or, is a non-mine thing". Alienation therefore serves to destroy property by way of the process indicated. Of course, the *saṃskāra* resides in the Self, or soul (the choice of words is of no importance to us here), and in this, we

are interested to note, Jayarāma, a staunch category partisan, is prepared to meet the Mimāmsakas half way: if *svatva* cannot reside in the Self, since it resides in the thing, its counterpart *svāmitva* at least can reside in the Self). However, this does not amount to an admission of the Mīmāṃsakas' case, for the logicians' apprehension of *svāmitva* hinges upon an arrangement of descriptions and localities which bind the thing and the person together in a shadow *saṃbandha* which the *saṃskāra* theory cleverly evades.

The Mimāṃsakas' doctrine is preserved in an additional statement, repeated. The 17th century author, Vācaspati-bhaṭṭācārya, grandfather of Jagannātha, apparently represented them as saying, to his own satisfaction, *svatvaṃ tāvat, tat-tat-dravya-vṛtti-saṃskāra-viseṣa iti*). This implies that the "impression" relates to, or operates in respect of , each item of property independently. Using the word dravya, which is wider than *dhana*, he includes worthless objects; and his use of the word *vrtti* cannot be in the normal logical sense, since it is nototious that *saṃskāras* inhere only in the person. A separate impression must exist therefore with reference to each item of property. The early 19th century author Rāmajaya Tarkālaṅkāra reports the Mimāṃsakas as saying precisely the same as is reported of Vācaspati; he comments however that their doctrine, weakened by the force of Raghunātha's objections, is *alūnasitṣam)*. The precise meaning of this phrase is difficuly to tell, but it apparently means "ridiculous", "barely tolerable"). Sanskrit polemics are sparing with terms of abuse. This seems a rare one. *Alūna* seems to mean "unshaven", in which case the phrase would mean, "having an unshaven head", i. e. improperly dressed, unfit for a public appearance. In those days Brahmans shaved practically all the head, wearing huge turbans.

If gift extinguishes Property, this tends to support Property's definition as a *saṃskāra*; likewise *tyāga's* power to extinguish Property. The fact that *saṅkalpas* effectuate dedications, and, at long intervals of time, effecutate transfers, by the mere operation of a communicated intention, likewise strognly supports the view that Property is a *samskāra*).

However. the need for a *jñāna* before there can be a *samskāra* seems fatal to the theory. Property is found in practice in cases where the *svāmis* are small children, idiots, lunatics, or senile persons; and the *saṃskāra* theory seems not to have been provided with means of explaining such anomalies). One cannot, in a pure *Dharmaśāstra* context, accept the solution of Rāmajaya nor its companion, the theory of the "imaginary Ownership". Jayarāma, *Svatvavādārtha*, shows awareness that the ownership of a boy and that of the same boy when grown into a man ought not to be distinguished; thence arises the notion that *svāmitva* must reside in the Self. Moreover, the operation of the law relating to "mistake" can be accommodated only with some considerable artificiality). The *jñāna* itself must be qualified and described, and therefore the definition contains something which must itself be defined, and the more variables are introduced the less attractive the definition.

Improvements upon Raghunātha

The effect of these attacks upon the discovery of Raghunātha as well as advances

in *navya-nyaya* technique brought forth a crop of new definitions and further developments, some of which are of jurisprudential interest.

Sri Kṛṣṇa, according to Jagannātha, attacked Raghunātha by showing that Property may reside in a *guṇa* as well as *dhana*, for one may own blackness in a black object. This Jagannātha and Rāmajaya, following him, denied. While the *dhana* may vary and lose and acquire various *guṇas* it would be unsafe to posit *svatas* which were created and destroyed with every variation. Consequently a movement was made towards detaching concentration from the *dhana* and shifting it towards the *svāmī*. *Svāmitva* occurs in the person, and that which resides in the *dhana* is *svāmitva-nirūpakatva*, "describerness of Ownership". Whether it be true that *svatva* resides in the thing or *svāmitva* in the person Jagannātha cannot be bothered to decide; that the logicians' general conclusions have assisted with specific problems is enough, and the matter need, he implies, be pursued no further.

An abortive attempt is made by Rāmabhadra Sārvabhauma to return to the forelorn *saṃbandha* notion. Dismissing the category and the *saṃskāra* theories, and their later accretions, he assets, *"caitrasyedaṃ dhanam" iti pratiti-viṣayo dhana-vṛtti-caitra-vṛtti-saṃbandhaḥ*, "A relationship, or conjunction, located in the asset and located in the person (X), being the subject-matter of the cognition, 'this asset belongs to X". This does not cease to be objective (cf. the basis of the *sāṃskāra* definition in VII iii (c), and it takes advantage of the fact that a *saṃbandha* must have a double simultaneous location. But we hear nothing further of this enterprising suggestion.

The big advance came, as Gokulanātha admits), with the Svatva-rahasya. There Property and Ownership were identified as one and the same category. To paraphrase the extremely involved conclusion. To ch. I: navyas tu svatvaṃ svāmitvañ caika eva padārthah sa ca vilaksaṇa-viśeṣanatā-sambandhena "atra svatvam idam svam" ity ādivyavahāra-kārako; vilakṣaṇa-visesanataya ca "atra svāmitvam ayam svāmī, atra patitvam ayam patir" ity ādi-vilakṣya vyavahāra-kārakah. na tu *svatva*-svāmitvayor bhedah; tad-ubhayor bhede 'pi tad-ubhayor avasyam puruṣa-dhana-niṣṭha-paraspara-vilakṣaṇa-viśeṣaṇatābhyupagamāt, etena viṣayatva-viṣayitvam api vyākhyātam. tad-ubhayor apy eka-pad-ārthatvāt. This category, which can be expressed indifferently by either word, is the facilitator or effectuator of practical *observations*, such as, "in this (is) *svatva*, this (is) *sva*" and, through the operation of a similar relation, "in this man (is) *svāmitva*, he (is) *svāmī*" : the two observations being present at the same time by the operation of different relations. The first, "definition-qualifierness-connexion", the second, "definition-qualifierness". It is doubtful whatever any very substantial difference is intended. *Svatva* and *svāmitva* being indentical, the single (unnamed) *padārtha* which they represent, produces two facts: (i) the thing's possession of Property, Property inhering in the thing not by the inherence of a generic character, but by a peculiar qualification relation due to the inevitable owner's defining the thing by his ownership immediately it is an owned thing; and (ii) the owner's possession of Ownership, the latter inhering in the owner because of his peculiarly qualifying the thing, defining it in terms of himself.

The mutual definition-qualification inhering in both person and thing, being single, proves that Proverty and Ownership are really identical.

It is not clear whether Jayarāma's conclusion is an advance on this. In his view *svāmitva* is still distnict from *svatva* (which it would certainly appear to be to the amateur logician); the definition of *svāmitva* being *ātmani śarire vā samvetaṃ nirūpakatā-saṃbandhena tad eva dhana-vṛtti svatva-vyavahāra-prayojakam*, "Whether it be located in the Self or the body, it is the means whereby transactions with *svatva* occur, referable to the assets, by relation of describerness. "Relation of describerness" is indirectly explained in Ingalls, op. cit., 46. In the statement. "There is fire in the mountain", which may be expressed, "The mountain is a locus of fire", fire or fireness may be called the *describer* of the locusness in mountain. The relation of fire or fireness to locusness in mountain is the relation of describerness. Jayarāma's syllogism appears to be this: "The thing is a locus of X's Ownership", i.e. the relation of Ownership of X to locusness in thing is the relation of describerness, because X's Ownership describes the locus "in", or scope provided by, the thing. The relationship of Ownership to X, however, is another question, with which he deals, but which he does not think it essential to settle for this purpose.

The process of identifying categories was not at an end. Gokulanatha made "debt" (*ṛṇatva* "debtness"), and its correlative *adhamarnatra* ("creditorness"), categories, and so also *jaya* and *parājaya*, victory and defeat in gambling, which he very properly distinguishes from indebtedness).

The last stage in the discussion to emerge chronologically is that recorded in Rāmajaya Tarkālankara):

> *svatvam tāvat : "svāmi ṛktha-kraye" tyādi-vacanāvagata-niyatopāyakaṃ viṣayatā-sambandhena dravya-vṛtti "yatheṣṭaviniyoga-yogyam idam" ity ādy ākārakaṃ tat-tat-puruṣṭya-yathārtha-jñānam eva. tad eva viṣayitayā puruṣa-gataṃ sat svāmitva-sariraṃ labhate. aprāpta-vyavahārācetana-devasvādau teṣān tathāvidha-iñānābhāve 'pi jñānāṃśe yogyatā-vinikṣepa-mahimnaiva kṣati-virahaḥ sampādaniyaḥ.*

> "As for Property — it is *true* knowledge on the part of individual persons, having the form, "this is fit for application at pleasure", located in (or referable to) things by contentness-relation, and having its means (of acquisition) determined from texts such as that of Gautama. When by containerness-relation it is located in the person it acquires the form (literally "body") Ownership. In the cases of the *sva* of minors, mindless *devas*), and the like, though such knowldege be absent, we must avoid admission of a fault in the definition because the sufficiency of a scintilla of knowledge explains the importance of the trust involved."

Rāmajaya was undoubtedly exposed to the influence of English law: he saw the British courts functioning and was familiar with the principal rights and remedies

available therein. It is difficult to see in the word *vinikṣepa* anything varying even slightly from the English legal term "trust", and the curious expression *jñānāṃśa*, literally "fraction of knowledge", looks remarkable like the English term "constructive knowledge". That minors' and deities' properties were in fact managed "in trust" cannot be doubted, the question was how to account for their Property if Property was to be defined, as the Mimāṃsakas defined it, in terms of the result of knowledge. Rāmajaya, whose definition does not require, as theirs did, that the acquirer *himself* should have had knowledge of acquisition, is relying on the fact that knowledge by others that property was for the use of its owner is sufficient to sustain the legal purposes of Property, and in the cases of minors and lunatics and deities the incapacitated Owners can be said to be such because they possess, or there exists, a "scintilla of knowledge" sufficient to enable the trusts to be established and managed. The great emphasis which the Anglo-Indian law placed upon guardianship both of minors and idols may explain Rāmajaya's somewhat peculiar way of referring to the position.

The *padārtha* theory is by no means abandoned by Rāmajaya, but the nature of the *padārtha* is settled with the aid of ideas borrowed from the general discussion which we have considered. The reference to *true* knowlede might upset some critics, as it would satisfy others, and the reference to texts would not please Mimāṃsakas, unless we are to take the phrase as a compendious expression (IV B i).

To attempt a redefinition of Property along lines familiar to Indian jurists meight seem superfluous. The Sanskrit language however affords unequalled opportunities for succinct statment, and the highly objective approach we have observed in Indian writers serves as an attractive pattern for all subsequent attempts at definition. Without attempting to give a general definition of Property, and without presuming to continue either the plainly inadequate *saṃskāra*, the *padārtha* or other allied and combined traditional theories, a new example is offered below for the purposes of reasearch and discussion.

Wherever Property is found certain factors are present, namely a cognition, an asset, an individual, and benefit to that individual by reason exclusively of that assets within the bounds admitted by law. You may use someone else's property unlawfully, but it will not be your Property which is involved. Your own property may be a source of illegal profit to you, but in so far as it is so it is not legally Property, for as Porperty is a legal concept Property must be absent in that connexion. Property does not therefore *reside* in either person or thing in any continuous, or perhaps in any, sense. If the benefit is not "of right" it may stem from someone else's Property. Hence Rāmajaya, ubi cit., was right in saying that *yath*-was unsatisfactory as a definition of *svatva* because it might exist in reference to the property of another *behind his back (tat-parokṣe),* for if it were known to him and he took no action *(tat-samipe)* a permissive enjoyment would exist which would be cosistent with *yath-*. The infernece is that that inaction would give one *svatva*; from being a trespasser one would become a licensee. In the definition given in the text above it will be observed that while a licensee has no Property in the source of his enjoyment, he has Property in its profits (whatever they may amount to). Thus a right to walk across

another's garden is a right in the nature of Property, the garden itself not being referable to the Property of the walker. A licensee has the enjoyment so long as his licence endures, and within those limits he may consider the enjoyment his propery; in so far as he has a right to the enjoyment that benefit is a factor tending to establish Property in his favour. The moment, however, the right ceases, and the enjoyment depends upon non-ejectment by the true owner, Property in respect of that asset of the benefit derivable from it ceases. Independence is therefore an essential factor, though it may exist within the scope of dominace on the part of others, provided that to the extent that Property is claimed the enjoyment in question is based upon a right and not mere sufferance. The definition may be put as follows—

> *tena tena dhanena caitrādi-nyāyya-svatantrātita-lābha-yog-yatvam iti "caitrader idam" iti pratīti-siddhatvam iti svatvam. lābha-grahaṇaṃ mānasa-santoṣa-kāyika-bhoga-vyāva-hārikāyādi-phalopalakṣaṇam. "caitrāder idam" iti pratiti-siddhatve, caitrādeḥ svāmitvaṃ prasiddham.*

"Property is the fact that cognition has occured that, "this belongs to X, etc.", i.e. that from certain assets X, etc., possess the capacity lawfully to obtain a non-permissive profit. The word 'profit' is illustrative of mental satisfaction, physical enjoyment, legal income, and so on. When this cognition, "this belongs to X, etc.," has occurred, the Ownership of X, etc., is undoubted."

One merit of this definition is the avoiding of the trap into which some Indian writers fell, of describing Property in terms of the powers of disposition implied.

It may be objected that although the cognition need not be on the part of any particular person, it may be mistaken. It may be added that although the term "lawfully" appears in the concept which must be cognised the cogniser may very well be under an illusion as to whether the "profit" is lawful. Since he may be proved wrong (in legal proceedings or otherwise) a Property has existed, according to this definition, for a time, and then is annulled *ad initio*, which is undesirable. The answer is that this is precisely what happens in every legal system. Mistakes are made, and individuals have frequently to pay for them. As a legal concept Property is not immune from such hazards). It may be objected that Property is thus being defined as a relative concept, dependent upon who has the cognition, if any cognition may turn out to be wrong. While two persons have incompatible cognitions about, for example, the lawfulness of an acquisition of profit by X, are we to assume that Property both exists and does not exist? The answer is that Property being a legal concept one cognition being ritht and the other wrong, the determination must be awaited. The word cognition does not imply a premature decision, and if the question arises whether it has been cognised it will naturally be considered whether material exists upon which such cognition could reasonabl be arrived at. That refers us to the law, which is what is required. Indian authors, by referring to "popular

recognition" (above, p. 48), showed their awareness of the difficulties in indiscriminate *cognition* — but they found no direct escape from the possibility of erroneous or conflicting cognitions. The "category" theory, by accepting from the lawyers the causes and destructive agents of *svatva*, correctly, it is submitted, assumed that the presence or otherwise of *svatva* must be determined by law, and this accepts the possibility of more or less lenghty doubts as to its location. The matter is nowhere clearly discussed, since to Indian scholars the rights of any disputed matter existed in a supersensory form, awaiting a judgment that might not occur. To western jurists this approach will not appeal uniformly: to us doubts as to the location of Property may imply doubts as to the existence of an answer: the possibility that in any particular case Property may not exist at all, though various parties parties claim to be entitled to use a thing, has to be faced.

Fortunately, in any such discussion we are not obliged to follow traditional Indian thought in looking for the precise "location" or inherence of our Property. But since Rāmajaya was content not to specify precisely which persons must have the knowledge which he identified as Property, we are safe in assuming that a departure from the traditional ideas, or perhaps a development of them, was imminent when the discussions were prematurely closed by the collapse of the ancient judicial system. And since our definition does not look to knowledge, or even the cognition, as the thing to be defined, but to the fact that a cognition has taken place, we are faithful to the Indian way of thinking in seeing Property in an abstraction: we must follow it up therefore by a further short definition.

"Property" as understood by jurists is really the abstraction of the Property defined above; it is what the logicians called *savtvatva*). "Property as the subject-matter of juristic investigation is the fact that Property as previously defined occurs." That is to say, in Sanskrit:

vyāpāra-vyavahārādi-nirnayopayogi svatvatvan nāma
yathokta-svatvasya loke sadbhāvaḥ iti.

Since Indian writers assumed, for the most part, that *svatva* must be conceived as existing in favour of determinable individuals and since no means of transfer could be recognised in which an indeterminate group could be transferees, it was natural that the expression "Public Property" should appear absurd). However, it seems likely, by the careful choice of the expression "X, etc." in the first definition above, that public Property is not impossible.

The phrases "X has Property in that", and "Property passes from *A* to *B*", are established in usage, but are misleading and inaccurate. Curiously, the conception of Porperty *passing*, *moving*, and *reaching* is not altogether foreign to Indian thought, since it is a commonplace for Indian texts to speak of *dhana*, even immovable property, moving,

etc.). However, there is a difference between, on the one hand, extending the metaphor appropriate to a cow or a horse to barely analogous instances of property, and, on the other, suggesting that Property itself passes. Here violence is being done to the abstraction Property itself.

Relationship between rulers and ruled

The subject of this study interested Indian scholars and publicists from at least as early as the middle of last century. The question whether Indians were fit to rule themselves, or at any rate to have responsibility for decisions affecting important national issues agitated all western-educated classes, whose preoccupation with a defence of India's claims to 'freedom' affected in turn vast numbers of their compatriots whose contact with the West was limited or at second hand. There is therefore a vast literature bearing directly or indirectly upon the question whether, in pre-British periods, Indians had been subject to a benevolent despotism, and if not, upon what basis they had been governed : and the desire toshow that Indians were hereditarily not unfit to control their own political lives took so large a control of the research, and what passed for research, that the majority of the works produced, in particular since the beginning of this century, must be read with great caution. Professor R.S. Sharma has, in a recent paper, very properly pointed out the tendentious and biased approaches of Indian scholars, and the lack of objectivity in their writing, and it is refreshing to find from a broad-minded patriot so frank, as well as truthful, an eposure of the limitations of our recent secondary literature. There are other limitations besides those imposed by the ardent desire for 'freedom'. Indian writers in particular Kasi Prasad Jayaswal have tended to read books on political theory in the West, and then searched in Indian material for ideas and features which could be set out in language originally suited to the western discussions, but which are by no means truly representative of Indian situations. The spirit that 'we have everything which you have, only better' is so pervasive that few works in English or French by Indian authors are devoid of that peculiar mixture of emulation and self-justification which taints most works of the pre-Independence period. One has to remember that promotion in that ill-remunerated sphere, university teaching, was to be obtained for publications which were loyal to India, her past and her aspirations, provided they were written in a style and from a viewpoint capable of being labeled 'scholarly' by western (principally English) critics.

The literature in European languages about Indian political thought and history is subject to a further weakness, which gave the tendencies adverted to above the fullest possible scope. In order to determine what were in, say, 1919, the political capabilities of Indians that is to say Muslims Hindus Christians, Parsis, Jews, outcaste-untouchables, primitave peoples, Buddhist or quasi-Buddhist peoples of the remote sub-Himalayan tracts, and others, no one suggested that reference should be made to their own actual behaviour and record. The relatively recent exxperience of local self-government revealed faction, friction, limited capacity for cooperation. The divergencies between the castes and

religious and ethnic groups seemed to suggest, upon their very face, the unlikelihood of democratic government as knownin other countries in the British Empire. In the realms where Hindus had always been self-governing, namely caste-regulation in matters of social etiquette and religion, it was notorious that impartiality and responsible administration were hard to find. Indians themselves, when approached in these connexions, all agreed that, whatever the shortcomings of the British and other foreign rulers, they were at least fair and impartial, and this was a consideration of enormous importance. The fairness of the open mind, even if it was an illinstructed mind, had its decided charms. The material for the study of Indian self-government, where it existed, was not encouraging and hardly adapted to an idealistic purpose. A work which throws a lot of light on the outlook and literature on the pre-First World War period, when independence was about to be sought with increasing violence and desperation, os J. MATTHAI'S excellent and informative *Village Government in British India*, London , 1915. This work , despite its title, gives ample and often valuable information on village self-government prior to the British period. His chapters handle education (2), poor relief (3), sanitation(4), public works (5), watch and ward (6), and the administration of justice(7). Hence the appeal was invariably to the 'golden age', before the British period commenced, before the Muslims intruded into India, to the period ripresented by the Sanskrit *nīti-śāstra*, 'science of government', the *artha-śāstra*, 'science of ways and means', and the *dharma-śāstra*, queen of sciences, the science of right eousness, within which was contsined what we call 'law' . But did these voluminous literatures really represent what *happened* in the somewhat vaguely defined, centuries or ages prior to the British period? How far could one rely upon statements to be found there for any proposition as to *fact* ? Naturally writers assumed that any written proposition a supporting their theses were actually fact, whereas a more onjective appraisal of the sources induces more caution.

It is not the purpose of this paper to exceed the bounds of our Society's investigation, which is knot into the full nature of kingship, or the various theories of government, but simply into the participation of the public in the process of government. As we approach in the prearranged order, the questions here investigated in parallel schemes for each country and civlisation, we should attempt to compare the statements in the technical literature with the evidence, so far as it survives, for actual behaviour in India. It will be evident that, day-dreams aside, the claims of India to be, traditionally and actually, a member of a group of democratically-governed nations is very tenuous, and that, though India's democratic form of government is likely to continue (by contrast with the experience of Pakistan, Burma etc.), democracy as known in India must be acceepted as different in nature from that experienced elsewhere in the Commonwealth, with the possible exception of its most recent recruits in Africa and South East Asia. The recent studies of politics in India reveal an awareness that this must be so : it is to be regretted that, by and large, too few of the many students of Indian affairs are equipped with first-hand knowledge of the 'old' India, and they are therefore handicapped when it comes to the question how much of the present-day scene is traditional, and quite what an

ancient historian would expect. It is further to be borne in mind that writers who are backing the 'new' India, as against the heavy competition of the 'old' India as it survives and pervades Indian life, are bound to pretend an ignorance they may not have, in order to lend strength to the now struggling impression that the 'new' India, the cosmopolitan, Commonwealth India, must prevail, and that the futre is on its side—whereas in reality the survival of the 'new' India in any but superficial senses is by no means to be counted upon: though those who are loyal to it and believe in it must not breathe a word of their doubts.

S

The Sāṃkhya school

It must be recollected at the outset that all schools, or *darśanas,* of Indian philosophy were believed to be equally true; contrary or inconsistent approaches to a question in the various schools by no means cancelled each other out; and the same man might be a master in several schools, originating doctrines which would advance learning in each, but which would be mutually incompatible. This was possible because the original teachers of each school had made fundamental postulates without responsibility for their reconciliation with those of rival teachers. The value fortunately of much of the ratiocination in the various schools did not depend upon the rationality or objective truth of some of those fundamental propositions, and this is particularly the case with the work of the *navya-naiyāyikas,* to whom we shall come.

The Sāṃkhya school) is concerned with the question of the evolution of the phenomenal world from a condition in which existence was divided between souls, a principle of intelligence (called *puruṣa* which otherwise = Man), and an ncoherent, indeterminate and indefinite stae (called *prakṛti,* which otherwise = Nature), in, or in association with which, subtle substances (called *guaṇas,* which otherswise = Qualities) remain unmanifested due to a primordial equilibruim. The lifeless *prakṛti* and the gunas have a teleology which brings about the disturbance of the state of equilibrium, from which the stages of evolution commence. The transcendental influence of the *puruṣa* attracts the *prakṛti* into action. Because of a *connexion* between the *prakṛti* and the *puruṣas,* which enables the latter to enjoy pleasures and suffer pain and through experience to find absolute freedom *(mukti),* evolution happens and the process towards ultimate release of all *puruṣa*s from existence is initiated.

The service of *prakṛti* to the souls or *purusa*s is simultaneous with the operations of the *gunas,* which are in fact guided ad directed by the teleology of *prakṛti.* The individual *puruṣa* is enabled to have *bhoga* of *prakṛti,* and it is not surprising that the former is conceived as masculine and the latter feminine. "*Prakṛti,* which was leading us through

cycles of experiences from birth to birth, fulfils its final purpose when this true knowledge arises differentiating *puruṣa* from *prakṛti*. This final purpose being attained the *prakṛti* can never again bind the *puruṣa* with reference to whom this right knowledge was generated; for other *puruṣas* however the bondage remains as before)." when *prakṛti* has performed its function it ceases to operate, as we are told, like a dancer who has danced to amuse her host, performs her function, and departs).

One of the effects of *mukti*, when the purpose of *prakṛti* has been served with regard to a particular *puruṣa*, is the cessation of ideas such as *mamedam, na me*, "naught is mine", is one of the "knowledges" leading to release: just as *asmitā* (egoism) is a symptom of non-knowledge). But while *prakṛti* is operating upon the *puruṣa* (or rather, while they are inter-operating) the notion mamedam is important. For some Sāṁkhya thinkers posited the saṃbandha between *prakṛti* and the *purusa* as *svā-svāmi-saṃbandha*, the *prakṛti* standing towards the *puruṣa* as property stands towards its Owner. Or it was *svā-svāmi-bhāva*, Property itself). In other worlds (since we are still at a crude stage in these discussions) *suatva* exists in *prakṛti* from the point of view of the *puruṣa*. This may not be a contribution towards the understanding of the concept of *svatva*, so much as a comment upon the concept so the Sāṃkhya school: but it is evident that "inevitable belonging" was so firm a concept by the time when the chief Sāṃkhya authorities were compiled, that it could be utilised for this rather specialised purpose. *Svatva* and bhoga are inseparably united here, though there is no suggestion that the bhoga is in any sense at the will of the *puruṣa*, and in fact if it has been suggested that *svatva=yatheṣṭha-viniyoga-yojyatva*, or even *yogyatva*, the basis of the idea would have collapsed) for it is of the essence of Sāṃkhya that the experiences of the *puruṣa* are not of his choice; happen through the self-application of the *prakrti*; and are intended to stimulate him to a condition of mind which many, if not most, *puruṣas* in fact neither wish nor can attain.

The dating of this Sāṃkhya concept presents insuperable difficulties, but it seems that 800 A.D. is not too early, and we are on fairly sure ground if we assume that it was in existence some time before the great legal commentators whom we may cite on the subject of *svatva* (circa 800+), and it is very likely tht it preceded the greater writers of the Mīmāṃsā school, though not, possibly, Sabarasvāmī himself.

Svatva: Definition

The *Saṃbandha* appears in two definitions which are by no means old, and its survival to this late stage is remarkable. *"caitra-syedam" iti pratiti-viṣaya-dhana-caitra-saṃbandha* is Viśvanātha Siddhāntapañcānana's defintion of *svatva:* "The relationship between the *dhana* and X which is the subject-matter of the cognition 'this belongs to X". A refinement found in Veṇidatta does not take us further forward. The difficulty with *saṃbandhas* is that they themselves require to be defined, and in this case we have the added embarrassment that "belonging to X" is a notion left unexplained.

The popular idea everywhere about Property is that "one can do as one likes" with

the thing in question. When it is pointed out that even in primitive societies one can never do exactly as one likes with anything, the answer is always that if Property exists "one can do whatever one likes with the thing, within legal limits". India was no exception. The earliest definition of this class, which has the longest effective history, is *yatheṣṭa-viniyoga-bhāva*, "the presence of an application at pleasure". When the thing is being so used, it is sva. What if it is not being used or enjoyed? It must be fit for enjoyment. Bhavadeva in his Naya-viveka says *tacca tasya tadarham yad yenārjitam)* The confusing word arha, "fit", "due", "worthy", "worth", "suitable" gets us little furthr : what a man has acquired, he says, he deserves, or is due to him or is fit for him. *tadarham*, of course, really amounts to *yatheṣṭa-vinyogārham*, "fit to be applied at pleasure").

A better attempt is dueto the author of the Madana-ratna-pradipa, a thinker of no small stature. *Svatva* is, he says, *yatheṣṭa-viniyoga-yogyatva*, "the fact that a thing is capable of application at pleasure". This gets over the two difficulties of *yatheṣta-viniyojyatva*, that the thing might be used unlawfully, which is destructive of a good legal definition, and that the thing, which is destructive of a good legal definition, and that the thing, while owned, might not be in use at all. He startles readers by pointing out that though a seed, when laid up in a dry barn, does not produce a sprout, it has by nature a capacity to sprout given adequate conditions; and similarly *sva*, though it may not in fact be employed in lawful enjoyment at pleasure, possesses the capacity to be applied at pleasure). Unfortunately *svatva* can hardly consist in a capacity only, since incapable persons are found in practice to be *svāmīs*, though they may never be in a position personally to exercise *yatheṣta-viniyoga*, and it is the personal element which is predominant in the idea of *sva*. The other major objections appear from Raghunatha's side, as we shall see.

Whatever the success of the attacks on *yatheṣta-viniyoga-yogyatva* as a definition, the idea did not die. *yatheṣta-viniyogārhatva* remained for some obstinate scholars the true definition), while yath-vini-yojatva is accepted by Sri Kṛṣṇa as the *lakṣaṇa* or characteristic of *sva*, and of *svatva* itself by Anantarāma. Moreover, when the idea, "I have taken *dhana* from X", exists it is quite possible that it connotes *yath-viniyoga*, and not *svatva:* for practical fitness for application at pleasure is not confined to one's own property).

This difficulty, which is really fatal to the definition, however we may tinker with it, encouraged a totally different approach. If the idea of Property is not a *sambandha* between a man and a thing, and it is not just the fact that he can do what he likes with the thing, perhaps it is some state of affairs in which the acquisition of the thing has happened, and alienation has not taken place? The gap, as it were, between these two might be the answer. *tat-krayādyanyata-motpattikālena yāvad-vikayadyābhāva-visiṣṭaḥ tat-krayādyānyata-mottara-kāla-saṃbandhaḥ svatvam iti* was the result: "Conjunction between Time posterior to acquisition with the Time of production of acquisition, particularised by persisting absence of alienation". Unfortunately alienation might never happen, and naturally a definition which hinges on the absence of a thing which may never happen is faulty. There is a circularity in this definition, too, which is fatal: even acquisition and

alienation are indefinable except in terms of Property itself. An attempt at an improvement on this definition reappears in a work written by Jayarāma Nyayapañcānana attempting to reestablish the nucleus of Raghunātha's theory).

Suretyship

Suretyship is one of the neat, precise, concrete topics of *dharmaśāstra* which enables us to compare the juridical achievement, as well as the legal history, of Indian law with its coevals of Judaism and Rome. The system under discussion is the classical system, which pervaded scholarly juridical discussions throughout India from the centuries immediately preceding the commencement of our era until the enactment of the Anglo-Indian codes in British India, or the introduction of the Civil Law by the Portuguese, Dutch, and French rulers in their territories. The institution of suretyship, superseded as to land revenue matters already in the early 19th century, became obsolete as to the majority of commercial and juridical matters with the enactment of the Indian Contract Act in 1872 (see Act IX of 1872, ch. VIII). But in practice the English notions of suretyship, not without some apprehension of civil-law notions, were already extruding the native Hindu rules and also the Islamic rules in use between Muslims as early as the beginning of the century in the Company's courts in the *mufassil* (i.e. the country apart from the Presidency Towns). In the Supreme Courts, which were royal courts functioning under the King's charter, the native laws of contract were specifically reserved, and the Hindu law of suretyship would certainly be enforced until the enactment of the statute referred to above; but those Courts had jurisdiction in a limited class of cases, chiefly those arising between inhabitants of those Presidency Towns (Calcutta, Madras, Bombay). A curious remnant of the Hindu law of suretyship, not recognised for what it is, does indeed survive in the topic called the Pious Obligation, of which a sufficient account will be given below. There is every prospect that this will survive for some time to come, since the codification of the law relating to the Hindu joint family in India is as yet only a project.

Sources of information on this system are in practice (with the exception of the document given in paraphrase in the Appendix below) nearly limited to the *dharmaśāstra* texts and a few modern discussions of them. Mahamahopadhyaya Dr. P.V. Kane devotes pp. 435-8 of vol. III of the *History of Dharmaśāstra* (Poona, 1946) to the subject of suretyship, and the topic recurs in two other : places to which we refer in due course. N.C. Sen-Gupta in his *Evolution of Ancient Indian* Law (London/Calcutta, 1953) mentions the subject very briefly (at p. 238). There is a long and competent chapter on suretyship in Dr. Ludwik Sternbach's *Juridical Studies* in *Ancient Indian Law*, Pt. I (1965), ch. 5. G. Mazzarella's studies began in 1903 and culminated in the massive *Etnologia Analitica dello Antico Diritto Indiano*, which (though neglected) merits attention for its comparative ethnological value. But the major ancient authorities on the subject are cited by Sternbach, to whose views many references will be found below. The original *smṛtis*, that is to say the verse, or verse and prose maxims or oracles setting out the fundamental rules, are collected for the most part in Gangānātha Jhā's *Hindu Law in its Sources*, I (Allahabad, 1930), pp. 177-189. He gives

references to the places where the *smṛitis* are to be found when, as is frequently the case, they are located only in digests and commentaries, and some notes of the deviations from and explanations of the *smṛitis* in those medieval works. As a short introduction to suretyship, free from comparative 'contamination', Jhā is very useful. In a somewhat similar manner Jha's translation of the *Vivāda-cintāmaṇi* of Vācaspati-miśra contains a section relating to suretyship, pp. 22-25, in which material is brought from other sources to throw light on the text. The digest entitled *Dharma-kośa*, published by Lakshman-śāstri Joshi, contains the *smṛitis* and extracts from commentaries at length, at pp. 661-667 (*Vyavahāra-kāṇḍa*, vol. I, pt. 2, publ. Wai, 1938) —this is a most authoritative compilation, enabling the reader of Sanskrit to see at a glance the contributions of the respective jurists. The somewhat dépassé section in Priyanath Sen's *General Principles of Hindu Jurisprudence* (Calcutta, 1918 —the work was compiled in 1909), pp. 320-4, still contains in simple terms the gist of the subject.

Suretyship (in Skt. *prātibhāvyam*) is an institution which is as old as Hindu law. It is mentioned in the ancient *smṛitis*, amongst whom we may count Gautama and Hārīta, appears in full in the later *smṛitis* amongst whom must (for this purpose) be placed Manu, Yājñavalkya, Nārada, Bṛhaspati, Kātyāyana, and is dealt with also in *smṛtis* whose authenticity is uncertain and are in any case very late, such as Vyāsa. It is referred to in Kauṭilya's (or Kauṭalya's) *Arthaśāstra*, where there appear some puzzling phrases, and there cannot be any doubt but that *prātibhāvyam* was known much as it appears in our texts from circa 500 B.C. It has been mentioned already up to how recent a period the institution has maintained life and validity. The word *pratibhū*, 'surety', is evidently an ancient word (resembling *punarbhū*, the remarried woman) and probably refers to the surety's being in some non-juridical and popular sense a deputy or substitute for the original debtor. The word occurs in contexts other than the securing of a debt. He has another ancient name, *lagnaka*, which seems to refer to the surety's 'following closely after' the original debtor, as if 'backing him up', supporting and clinging fast to him. These vague semantic indications may have a legal historical value. And another testimony to age is the presence in this context of words having a strictly applied meaning, a small technical vocabulary.

Before we commence to review the topics undertaken for comparative study special, individual mention must be made of the material upon the subject of suretyship in Jagannātha Tarkapañcānana's *Vivāda-bhangārṇava*, which has been (on the whole) adequately translated by H. T. Colebrooke in his *Digest of Hindu Law on Contracts* and *Successions*... (citations below are from the Madras, two-volume, 1864-5, edition). Sureties are treated in ch. IV of Book I (pp. 159 and ff.), and the treatment is ample and sufficient. A lawyer of the 1850 period would certainly have been content to refer to this chapter, and to treat it as absolutely authoritative for the administration of Hindu law on the subject to Hindu litigants. There is no doubt that it would have been considered superfluous to refer to the original *smṛtis* upon which Jagannātha founded his work and which he cites and explains. However, we have discovered that Jagannātha was questioned

and almost certainly advised to some extent by a common lawyer (perhaps by Sir William Jones himself or some attorney-at-law practising in Calcutta), and the work reflects a certain influence of European approaches if not also European legal ideas. There is no reason for excluding the possibility that in this chapter as in others Jagannātha was tempted to arrange his material in a manner not characteristic of his predecessors. Thus his very commencing with the question, who may be accepted as a surety, reflects a non-traditional arrangement. The *Sukranīti*, a work of the first half of the 19th century, is much cited by Sternbach, but its usefulness is even more questionable than Jagannātha's. After this word of warning we may safely proceed to our topics.

History of the Institution

We have seen that suretyship is of great age. The *smṛitis* contain phrases the exact meaning of which is open to debate, and consequently the commentators take advantage of this to amplify or contract the law at their discretion (a usual phenomenon); but it is to be noticed that no fundamental changes of importance in the law relating to suretyship are to be observed throughout the two millennia of its observed history. The present writer (unlike Sternbach or Mazzarella) cannot detect signs of evolution. Hence the creative work must have been done long before the Christian era.

The definition of suretyship given by Vijñāneśvara (c. 1125) in his commentary on the *Yājñavalkya-smṛti* is this: *prātibhāvyaṃ nāma viśvāsārthaṃ puruṣāntareṇa saha samayaḥ*. This can be translated, "The word 'suretyship' means the contract or agreement with a third party which has as its object (or 'for the purpose of') confidence (in the second party". Sternbach is not satisfied with this, and says, "This definition is not detailed enough. From the point of view of ancient Indian law, the contract of suretyship should be defined in the following manner: a contract of suretyship is a contract whereby a man binds himself to be personally answerable for the obligation of another, as an accessory debtor, in addition to the person principally liable". One would not quarrel with Sternbach's definition, based as it is on a scrupulous investigation of the *smṛitis*. But one could observe, first that jurists like Vijñāneśvara were highly trained minds, and versed in logic, whence it follows that the definition is deliberate. Now it follows that the classical definition insists upon aspects which Sternbach would not necessarily see as uppermost: firstly, *prātibhāvyam* is the actual contract itself, and not an abstract notion. There is a suretyship when an agreement to answer, if necessary, for another man's obligation is still valid and binding. Secondly, Sternbach's intrusion of the word 'personally' could give rise to misunderstandings. If anything is clear it is that the surety's obligation does not necessarily die with him (as Sternbach fully explains in his article), and, moreover, the obligation attaches to the surety's property—indeed, without the liability of the surety's property (the surety, as we shall see, should be an independent, rich man) the institution of suretyship is a mockery. Next, the classical definition insists that the institution exists for the purpose of inducing *confidence*: and there can, therefore, be a

suretyship in the eyes of the Hindu jurists though no definite or even envisaged obligation is in question at the time of the agreement. As we shall see, the Hindu jurist was interested in the confidence aspect rather more than in the debt aspect: though this is not to suggest that there was any defect in the agreement — evidently there was no suretyship without an explicit undertaking to indemnify the third party in case the confidence should turn out to be unjustified. And this would apply with equal force and with equal validity whether the confidence turned out to be unjustified by chance, misfortune, or fraud: what is in view may as well be speculation as normal business undertakings. The institution of suretyship existed to enable risks to be taken, and not only risks in respect of the second party's honesty and integrity.

Furthermore, Sternbach, keeping close to his authorities, overlooks what they have indeed overlooked. To the Hindu jurists — unlike the Société Jean Bodin -there was not suretyship unless there was an agreement. In other words all suretyships arose out of agreement, or imputed agreement (since the word *samayaḥ* can, and certainly must here, include the village-compacts with regard to payment of revenue and the like which were binding upon each generation in turn, as with our Acts of legislative assemblies, so that a son or other successor, or a newly settled immigrant, would be bound by a subsisting village-compact). Yet, as a matter of fact, suretyship by law existed, in which no element of contract or agreement arose: this was not recognised as suretyship because the liability of the male issue of a man, not separated from him, to pay his debts whether or not he left separate assets was a survival from a period when 'separate assets' had not yet achieved legal recognition, and the sons' liability was viewed as an aspect of their joint ownership with their father, and attributed to a religious obligation—which we shall investigate more closely.

Ignoring, then, these suretyships by virtue of law, the *dharmasāstra* knows six main types of suretyship, six heads, under which all known agreements could be classified. Some *smṛitis* would contend that there are only three types, some more, and Sternbach would find seven types, and suggests that there are two additional instances not properly classified (about which it is possible to differ from him in interpreting the teaching terms). The six heads are these:

(a) (i) Suretyship for the appearance of the second party to answer charges against him, or to submit to penalty or attachment of his person, or otherwise.

(ii) Suretyship for the hinesty of the second party, i.e. that confidence may be placed in a state of facts, e.g., his ability, reliability, and so forth.

(iii) Suretyship for the payment by the second party of a sum of money that will be lawfully due from him.

(iv) Suretyship for the restoration by the second party of objects which he will be or is due to render up, whether these be (a) his own effects, which are pledged, such as moveable property with which the second party might abscond, or (b) effects, such as a jewel, deposited or loaned, to the second

party by the third party.

(b) (v) Suretyship for the second party's performing all obligations that will arise out of his instituting, or defending, litigation, and suretyship for the second party's taking the oath or performing the ordeal which the course of litigation might impose upon him. It has been suggested that to this category must belong suretyship for 'the peace', i.e. a turbulent individual may be offered an alternative between finding a surety for his good behaviour, or imprisonment, and this is an aspect of litigation.

(c) (vi) Another, alternative view is that the classical suretyship for 'the peace' relates properly to the sphere of international law, where a hostage guarantees the performance of his obligations by a king towards another; and in principle the same institution would apply to agreements guaranteeing the good behaviour of princes, ministers, governors, and so forth.

These six categories of suretyship were evidently essential to the running of commercial and political life. Litigation certainly could not have developed without suretyship (including the notion of bail) to guarantee the honesty and fitness of the parties to prosecute their claims before the judge. Throughout the scheme the notion is that an individual, totally independent of the second party and the third party, and of ample financial means, supports as accessory the undertakings of the second party. The only other suretyships known, namely that of villagers for each other in respect of payment of revenue, and of the male issue to pay the debts of their ancestor, escaped notice as distinct types of suretyship, the first because it was, after all, only a variant of (iii) above, the second because it lacked the common ingredient of all 'true' types of suretyship.

It is not surprising that the ancient authors were content, for the most part, to summarise all suretyships under *three* or at the most four heads, namely appearance, honesty, and payment (and delivery), and taking the latter in a rather wide sense it is practical so to understand the scheme; and so it is understood to this day in the Anglo-Hindu law relating to the sons' liability to pay their father's suretyship debts.

Fundamental Characteristics of Suretyship

The surety could undertake either a general responsibility, such as in the case of suretyship (ii), which might involve him in great expense if the second party robbed his employer (for example), or a specific responsibility, as in the case of suretyship (iii), as where, for example, the second party undertook to pay a principal debt with interest to a stipulated or customary amount. The obligation of the surety was secondary to and accessory to the obligation of the second party (the debtor). This feature is preserved in the document in the Appendix, where some departures from the common Hindu law are visible. One surety could guarantee any number of obligations or debts, and one obligation or debt could be guaranteed by any number of sureties, the latter acting as

partners, or independently as co-sureties, liable jointly and severally for default of the second party. The creditor, or third party, had freedom to demand pledges and sureties, or either of these, and the terms of the original agreement between the second party and the third party might depend fundamentally upon the presence or absence of these.

Up to this point we have not discussed the relation between husband and wife and between partners, It might be asked whether the development of credit was not assisted by the availability of sureties drawn from such close associates. The answer is negative. Though the property of the wife was not available for the payment of the husband's private debts, nor vice versa (subject to an exception which cannot be discussed at length here). the ancient theory of the indivisibility of husband and wife prevented spouses acting as sureties for each other. Similarly, though coparceners (co-heirs of ancestral undivided property) could rely on family : debts' being paid by the managing member for the time being, whoever had contracted the debts, this was not a case of suretyship, because no debts were binding unless they were for family purposes, and the family funds could be pledged (normally by the manager only) exclusively upon that footing. Partners likewise could bind each other by proper acts within the scope of the partnership, but they, like the coparceners, could not be sureties for each other. A surety must, after all, not be joint in estate with his principal. Thus co-owners or partners could very well act as sureties for other people, and indeed a partnership would make a very suitable surety, since the risks would be widely spread though only one partner might appear as surety in the agreement; but the payment of family debts or partnership debts by any co-owner or partner is not an instance of suretyship.

The fact that a surety in category (iii) would be liable *together with his sons (only)*, so that if he died the third party could call upon his sons to make good the guarantee, strongly reinforced the value of this suretyship. Under certain conditions even sureties in categories (i), (ii) and (iv) could offer the same security; but these conditions will need to be studied in detail before the significance of this can be grasped. How suretyship could be inherited, and why it could be inherited only by the first generation of male issue, is something of a puzzle which no comparative jurist has yet solved.

Suretyship and Pledge or Mortgage

We have seen that the creditor, or third party, might choose which security to use; and even in litigation the parties might (one supposes) use the pledge method rather than suretyship. It would be in the discretion of the court whether to accept one, the other, or both. On the whole the ancient society must have favoured suretyship, since it combined prestige and property, and was not tied to a particular place. If chattels were pledged the borrower often had to maintain them in the possession of *ādhipālas* , who were, as stakeholders, in a sense guarantors of the pledge, and thus an additional risk for the lender. The settled and developed society no doubt preferred the mortgage of land to any other security. But there might be occasions where mortgage might have involved

difficulties or expenses for the creditor, and rights of exacting the obligation from a suitable surety might have been ample and satisfactory by comparison. It is not easy to generalise from our existing information. The document reproduced in our Appendix shows that pledges and sureties were frequently taken, yet it would seem to show that, as between pledges and sureties, the lender was under an obligation to call upon the sureties first (§ 5) and only upon their failure to pay might he sell the pledges.

The Juridical Technique of Suretyship

(a) *Creation of the security*

We have seen that *prātibhāvyam* was created by an agreement, and was voluntary. The customary mutual suretyship of villagers in respect of land-revenue is very little known and it is not practical to give details here, the subject requiring close research amongst the limited and scattered sources. Here, at any rate, there must have been an implied agreement even if in fact no actual agreement could be discovered, and to this extent this class of suretyship was exceptional. The agreement normally required two parties, the surety and the third party. The second party was not a party to this agreement, though of course he benefited from it. In the Appendix we find no trace of the Surety's agreement to the terms exacted by the lender from the borrower, and the proper inference is that another agreement was required between surety and lender — which the book does not exemplify. The surety was bound in any case by his promise, and not by the borrower's. As is normal in classical Hindu law, no consideration was required in order to make the promise of suretyship binding upon the surety himself. Nevertheless, it was plainly a common thing for sureties to undertake the responsibility of suretyship only upon an understanding, that is to say, a contract, between themselves and their second parties. In order that A should agree to guarantee C's loan to B, it was common for A to exact from B a promise, not of reimbursement should A be obliged to repay the loan to C— for this is an aspect of the relationship between A and B which was implied by the law itself and required (as we shall see) no stipulation — but a promise of payment for his services, for his taking the risk. Thus in ancient India we already had an institution of suretyship for reward: some called it a 'black' (reprehensible) means of earning. This was similar to our indemnity-insurance policies, in which, for a reward, insurers undertake to guarantee loans or to indemnify against risks. Furthermore, the surety might undertake to guarantee the loan only after B had consigned to him, or hypothecated to him, a valuable piece of property which C himself refused to accept as security, or was unable to accept as security. In other words, the right of reimbursement, implied by law, had itself to be secured, at the surety's option. We have reason to believe that by depositing wealth to secure a person's suretyship was one of the well-known ways of losing one's capital.

In the cases where the surety has given his undertaking to the third party after receiving (a) a payment, or (b) a pledge, or the equivalent, the contract of suretyship was

stregnthened by the fact that the son of the surety would make good his undertaking after his disappearance or death. These are the exceptions to the rule that only sureties in category (iii) are represented by their sons. It follows as a matter of course that third parties greatly preferred sureties who acted for reward (a natural result of professional skill and mercantile enterprise) or accepted a security of their own. It is possible, therefore, that although on the surface mortages of immovable property might be a better security than a surety, insistence on the second party's providing a surety of the type who acted only after receiving a pledge or hypothecation might give the third party the best of both worlds. There is evidence that in such cases the lender might charge a higher rate of interest lawfully than could be allowed in conscience if he had taken the pledge himself. *Volunteer* sureties could even be fraudulent.

The special case of the male issue who must pay their father's debts other than suretyship debts (subject to reservations to be discussed below) has been noticed already. Their agreement was not necessary for their obligation to arise. It was supposed that the religious duty to secure the deceased ancestor from the pains of hell was inherent in sonship. Originally the son was liable whether he were separate from his father at the time of the latter's death or not, but only if he were above the age of majority. Originally the son was liable for all the debt, with interest; the grandson without interest; and the great-grandson likewise only if some property of the great-grandfather (however small) actually reached his hands. The unlimited liability of sons remained in Bombay Presidency until the last century, when it was abolished by statute. Elsewhere it was felt, under British administration, that sons' obligations should be confined to the properties they received from their ancestor; that the obligation did not arise for the first time on the ancestor's death; and that there was no difference between the position of the son, the son's son, and the son's son's son. So far as joint-family property was concerned the debt enabled the father during his lifetime, or the court acting in his stead, to alienate the undivided interests of the male issue to pay his debts, provided that the debts were antecedent to the alienation (and so already binding upon the male issue). Debts contracted by the ancestor which were not 'recognised' for this purpose by the Hindu law could not be exacted from the sons, etc., and for such purposes the interests of those male issue could not be alienated. The modern formula is that the male issue are not under a Pious Obligation to pay the tainted, i.e. illegal or immoral debts of their ancestor; nor are they obliged to pay untainted debts which are not antecedent, nor which were incurred, posterior to the separation from the ancestor of the male issue sought to be made liable.

(b) Extent of the security

The male issue referred to above had, and have, a liability which extends as far as the property available, that is to say the entire undivided interest in joint-family property may be taken to satisfy any untainted, antecedent, pre-partition, private debt of the father. But the more normal categories of suretyship anticipate three types of personal obligation:

(a) the unlimited, as in suretyship of category (ii); (b) the strictly limited as in categories (i), (iii), (iv) and vi); and (c), in category (v), the peculiar unlimited type of obligation which admits however of reasonable conjecture. The fines imposed and the sums to be awarded can be calculated with reasonable exactness, and the risks can be judged with fair accuracy. The surety is not liable beyond the liability of the second party.

(c) Qualifications for being surety

We have seen that individuals on their own behalf or as representatives of a partnership might become sureties. The Hindu law of the classical period provided a long and interesting list of persons who should not be accepted as sureties by the third party. As usual with the *dharmaśāstra* the list does not distinguish between the persons who are *incompetent* to be sureties in the case under consideration, and those whom it would be *inadvisable to accept* as sureties. We can make the distinction for ourselves.

Incompetent to act as sureties are:

(i) husband for his wife, and vice versa;
(ii) one co-heir for another co-heir, unseparated;
(iii) father and a son unseparated from him;

though the presupposition is that the debt contracted by the second party is in respect of the property joint between himself and the proposed surety. If the second party be dealing with property which is not joint between himself and the surety the incompetence , of the latter does not arise.

Unsuitable to be tendered as sureties are:

(i) a person who is not well-known;
(ii) one who is of bad character, or is already liable to pay a fine.
(iii) one who is a close prisoner, or is not at liberty to pursue his rights against the second party;
(iv) one upon whom the third party is himself dependent, as, also a servant of such a one;
(v) one who is an enemy of the third party, or an intimate friend of the second party; or his pupil;
(vi) one who has abandoned the world;
(vii) the king, or a minister of the king;
(viii) one unable, or reputed to be unable, to pay the sum which is in issue, or who could not pay a fine of an equal amount.

There may be debate as to the reasons for these ancient rules, but their general good sense is evident. Two additional rules are of great interest:

(ix) one should not be accepted as surety who has a father living;

(x) nor should one choose him who acts 'according to his sweet will'.

This reinforces the basic supposition, that the surety ought to be an independent man (which a man whose father is living is in io theory incapable of being), and that a reputation for responsible conduct is essential. Though the surety must be independent and thus capable of doing his duty without anyone else's consent, he must not be so independent as to have no regard for God or men, so as, for example, to disregard his obligations to the third party, or overawe the court, or otherwise bring the legal system into contempt.

The question arises, what would be the effect if the third party, or the court, accepted as a surety an insolvent, particularly a man who was in fact insolvent, but not yet so to his own knowledge. It seems that the rule *factum valet* is applicable — one should not appoint or accept such a person as a surety, but if he has been accepted his obligation exists. And the same remark seems applicable to the other nine instances of persons who are unsuitable sureties. No question arises, but that the loan of C to B is unaffected by any defect in B's surety, A.

Primitive legal systems must have considered the question whether a surety himself might require to be guaranteed by a sub-surety or 'counter-surety'. A story to some such effect is found in Jewish *midrashim*. But in the Hindu legal sources no idea of sub-suretyship is found. The relationship involved in suretyship appears to be exclusively triangular, and no doubt it is for this reason that in our Appendix we find sureties and pledges coupled together. But in pre-British times counter-sureties are in fact found. We are unable to draw any inference from the names being Persian in origin.

(d) *The relationship between the surety and the creditor*

The third party can take up and enforce the obligations of the surety only when the debtor, the second party, has failed in his obligations: the document in the Appendix bears this out.

When the suretyship is in category (i) the surety is allowed an interval according to the terrain and circumstances in which to produce the second party; if he ultimately fails he is liable to the fine or penalty which would have fallen upon the second party had he appeared and been condemned.

When the suretyship is in categories (iii)-(vi) the surety is obliged to pay the value in dispute. He is entitled to claim time in which to find the principal debtor, if necessary. In order to protect the second party from undue pressure by the surety after the latter has made payment two provisions are laid down: (i) the surety must not make payment to the third party until the latter, after failing to obtain payment or satisfaction from the second party, has recourse to the surety. It is not in order for the surety to make payment spontaneously. However, once the third party has applied to the surety, it is the latter's

duty to make payment without necessitating the third party's applying distraint, or otherwise harassing him. For in the latter case (ii), should he have to suffer distraint at the hands of the third party, he will have a right of special recourse against the debtor, the second party.

The question may well arise whether the surety, when applied to for payment by the third party, has the right to dispute the debt alleged to be owing. The curious terms of the document in our Appendix strongly suggest that ordinarily he has. Naturally, where the suretyship was for the payment of what should be due or what should turn out to be payable by the second party it would be fraudulent if the surety were not entitled to raise any objection or call for any account which the principal debtor could have insisted upon. Therefore, we have evidence of a right in favour of the surety similar to subrogation. It is for this reason that when the institution of pleading (in litigation) by *vakils* (attorneys) arose in the last part of the 18th century the Hindu jurists visualised the *vakils* as not merely agents but even sureties for their clients, the latter having not merely authorised them to conduct litigation on their behalf, but actually investing them with their own rights *vis-a-vis* the third party, so that a decree against the surety would be in effect a decree against them, and the *vakils* would be entitled to full reimbursement from their principals. This theory, of considerable juridical interest, is evidenced, but it did not survive, since *vakils* operated as agents, and it is in that guise alone that legal representation exists in India, Pakistan and Burma at present.

When the suretyship is in category (ii) different considerations arise. The third party could require the surety to pay the value of any loss caused to him by the fault or default of the second party, both where the latter was dishonest or where he was incompetent. Here there could often be no question of subrogation. In many cases the second party might not be under any legal obligation whatever. But the debt would arise simply out of the contract between the surety and the third party, and the surety would have a right in his own person to dispute the amount alleged to be due from him by the third party.

If the surety is missing when the third party's claim arises his sons and heirs are liable in all cases where the suretyship was undertaken for reward (a rule no longer observed in the Anglo-Hindu law), and the sons are liable in all cases where the suretyship was for payment. It is of interest that while the sons and grandsons of both lender and borrower figure in the agreement given in our Appendix (§ 4) the sons of the sureties do not—plainly the legal liability was sufficient. When a pledge or other security was taken by the surety himself, at *dharmaśāstra* the sons and heirs would be liable, but this rule also has been abandoned in Anglo-Hindu law. In the cases of suretyship for payment or delivery the sons alone are liable, for the rule of the Pious Obligation has most curiously not been extended to the grandsons and greatgrandsons for this class of debt. The texts expressly confine the obligation to the surety's sons. The rights of the third party against these representatives would be the same if the surety had disappeared or died. If there are many sureties the law depends on the agreement. If these are co-sureties, jointly and severally liable to guarantee the obligation of the second party, the creditor,

the third party, may demand the entire amount from any at his choice. That surety, after payment, failing to obtain reimbursement from the second party, has no right of contribution from the other co-sureties. If however the sureties have jointly undertaken to guarantee only portions of the amount, as would happen in the case of a revenue- farmer, who might require numerous sureties in fractions, the third party is entitled to take up the obligations according to these fractions, and the sureties' rights against the second party would likewise be related to those same fractions. We notice from the document in our Appendix that the borrower undertakes that the lender many recover the entire debt from any surety and that none of his sureties (the document does not contemplate less than two) may direct the lender to have recourse to others.

(e) *The relationship between the surety and the debtor*

After the surety has paid or otherwise satisfied the third party he has a right of recourse against the second party. The Hindu law was formerly very strict here. The subject of interest on loans is complicated and it would be out of place to repeat here observations set out at length in another connection. Let it suffice that after an interval of six weeks the amount paid by the surety begins to carry interest, and apparently (if the texts are to be interpreted literally and not as more recent Hindu jurists would wish) at a peculiar rate. After the interval, during which the absconding or defaulting second party could be apprised of the position, the capital of the debt is doubled: and even at the expiry of the seventh week the surety is entitled to realise at one time twice the amount of the debt. Was this some kind of compensation?

This penal rule applies only when the third party has had to enforce payment from the surety by public process. In other words, where the surety holds out in case somehow he can arrange for the second party to meet his obligations by another method, and has failed, the second party must pay dearly for his dishonesty or incompetence. The institution, which is most peculiar, is evidently intended not so much to encourage people to become sureties as to discourage borrowers from too readily utilising the facility of having a surety. The text of Hārita penalising those who exact from a surety the extent of double or triple is probably intended to prevent creditors from taking this rule as an advantage for themselves.

We have already discussed the surety's right of stepping into the second party's shoes if necessary to dispute the amount claimed from him by the third party, claiming set-off, and the like.

Prior to payment the surety has no right secured to him by law, but it is evident that he is entitled to follow his second party if necessary, or to apply pressure to him, short of distraint (for he is not himself yet a creditor) in order to persuade him to answer to, or otherwise meet, his liabilities. Manu says (VII, 17) that Punishment *(Daṇḍa)* is the 'surety' of the four Stages or Orders of society, i.e. it keeps them to their duties as real sureties do not allow debtors to deviate or go astray.

(f) *The relationship between co-sureties*

So far as this is known we have covered the topic in sec. d) above. The *dharmaśāstra* does not in so many words proceed further to explain the rights of sureties, except against the second party. This is evidently because of the custom for sureties who had no sentimental or political motive in acting as sureties to take pledges, hypothecations or mortgages of property belonging to the second party, thereby securing themselves against loss. Where one of a number of co-sureties is forced to pay the amount, he has, strangely, no right of contribution against the others. Co-suretyship was, after all, a voluntary relationship. The law did not become controversial. Bṛihaspati (X.111-2) exempts the *son* of a *deceased* co-surety from all but his father's share, but the point is not debated.

(g) *The extinguishing of suretyship*

Upon payment by the second party, or other compliance with his obligations, e.g. appearance *on* the day of his trial, etc., the obligation of the second party has ceased, but there is no automatic extinction of the obligation of the surety. True, it is not necessary that the third party should explicitly release the surety, but the obligation of the surety ceases to be enforcible — though the result in point of fact is the same. For this reason, it seems, the lender would agree that conditions which released the one would release the other — for such would be in the inference from §§ 7, 8 of the document in our Appendix. When the second party has paid there is no cause of action between the third party and the surety, since the obligation that was the subject of the guarantee has been extinguished.

If the second party defaults, the suretyship is extinguished by the surety's payment. It can be extinguished, of course, like any other debt, by the release of the third party. There being neither a law of insolvency, nor a law of limitation of actions for debt, no other method of extinction is available except the death of the surety, *except* in the cases when the sons or heirs are bound to meet the obligation (see above), in which case the suretyship comes to an end when these pay the amount or die without having paid it. The death of the third party, or acts by him, will not terminate the obligation, unless the acts amount to a release, if validly given.

Conclusion

One notices the relative simplicity of the Hindu law relating to suretyship, except for the portion at present surviving in the Anglo-Hindu law, where certain complications (in particular relating to the nature of the debt and the question of taint) survive. The age and the consistency of the institution speak for its efficiency.

Granted that this must be so, the question remains why was it superseded by the

Indian Contract Act? Naturally the determination to supplant both Hindu and Islamic laws of contract was at the bottom of the programme put into effect in 1872. But the new rules relating to suretyship bore a close resemblance to their Hindu predecessors, except for the provision about the double payment for the defaulting second party, the original debtor. For this there is no counterpart in any Anglo-Saxon system of law. Examples of coincidence between the systems are not few. For example, the consideration for the contract of suretyship, the guarantee, passes from the third party to the second party and not to the surety himself; again, if the nature or extent of the obligation owed by the second party is varied by the third party that will terminate the liability of the surety, for he has promised only to enable the third party to have confidence in the second party with respect to the matter in existence at the time of that promise. The Indian Contract Act is a little more strict in that it provides, in s. 135, that the surety is discharged if the third party (the creditor) gives time to the second party (the principal debtor) or promises not to sue him in court. At Hindu law a mere prolonging of the time available or variation in the method of seeking a remedy would not necessarily discharge the surety. Both systems agree in the rule that the discharge of one co-surety does not discharge other co-sureties. But the Act diverges from the ancient law in providing that the surety is discharged in any case if the third party does any act inconsistent with the surety's rights, or omits to do any act which the surety has required him to do. It seems to the present writer (the sources are not decisive) that the agreement of suretyship would not be terminated by such conduct under the old system, but that when the third party sought to enforce his rights the surety would be enabled to contend that a condition had been broken, for which he would be entitled to ask for a set-off, or that the third party was guilty of fraud, in which case the court would adjust the equities between the parties. The insistence of the agreement in the Appendix upon the surety's not raising objections to the lender's proceedings (§§ 6, 7, 11) speaks for itself.

A major difference between the old law and the Act is to the advantage of sureties, and supplies a reason for the superiority of the new law over the old, the European over the native. Under the old law the third party must first exercise his rights against the second party, including, it seems, the sale of pledges; only when the second party's obligations remained outstanding was it possible for the third party to apply for performance of his obligation by the surety. The evidence of § 5 of the agreement below, which requires the reverse, can be relied on for this. Under the Act, s. 141, which follows the English law, the surety, having paid the debtor's debt, is entitled to the benefit of all securities which the creditor has against the principal debtor, whether the surety knew of the existence of such securities or not. Furthermore, the loss or release of such securities by the creditor would discharge the surety to the extent of the value of the security lost or discharged. This aspect of subrogation does not seem to have been required or understood in the original Hindu law.

Though it is true that at the ancient law the relation between surety and third party is contractual, whereas at the modern Indian law it is fiduciary, the difference (though

not negligible in practice) cannot be regarded as decisive of our question, since all cases in contract were fit, in the pre-British Indian courts, for being treated with a regard for equity, for equity and law went side by side. Thus where a surety was deceived by his third party he could plead this defect either in order to have his contract set aside, or to have his obligations modified *pro tanto*. There is a remarkable improvement in the law by an introduction of an English rule in the Indian Act, s. 146 read with s. 43. It provides not only the right of a creditor to proceed against one or more co-sureties, but also their obligation of contribution as between them. The Indian Act does not indeed mention suretyship by shares, but the illustrations sufficiently cover such a case (Ill. (b) to s. 146). One may conclude that the Indian Contract Act offered what was required by the public, and that the penalty of the double payment by the defaulting original debtor was not of such importance in practice that the public deemed it requisite to retain it. The Act, in any case, did not purport to regulate the arrangements which might subsist between a proposed debtor and a proposed surety, and a bond might well be conditioned for the former to pay a penalty to the latter — a penalty which an Anglo-Indian court might refuse to recognize in practice but which the natives might, at least for some decades, treat as binding in conscience between themselves.

SĀTĀTAP

If the person gets calamities like disease, fire, death of some relative, severe pain, loss of cattle, corn or wealth within seven days or even after that, he is detected as guilty.

Following are thus the important points to be discussed in the Kośa ordeal. (1) The place of the ordeal. (2) bathing the deities in water. (3) Preliminary rites. (4) Mantras to be addressed. (5) Signs of the success or the failure of the trial.

(1) The place of the ordeal:

According to Visnu, the accused person should face the god while drinking the water. Nar. says that he should face Sun at the time of drinking water. According to Hārita, the place must be plastered with cow-dung.

In the earlier times, the bathing of the deities was perhaps conducted before the accused person, but according to the later writers it was not necessary to do so. The Prāḍvivākia, after observing the preliminary rites, should bathe the deity, bring the water to the place of ordeal and give it to the accused person. This is clearly mentioned by the commentators and the digest-writers.

According to VP, the Kośa ordeal is conducted in some temple. This is also confirmed by Alberuni.

(2) Bathing the deities in water :

(a) Viṣṇu says that the stern deities must be bathed in the water. Stern deities are

Rudra, Aditya, Durgā and others, points out SC.

Nār. brings an important change. The deity of which the accused person happens to be a devotee must be bathed for the purpose. Pit. supplements the rule by saying that if the person holds all the deities in equal esteem, image of Sun should be bathed. Important rule given by him is that of bathing a particular deity for a particular kind of offence. e.g. the image of Durgā in the case of theft or for the persons who live on profession of weapon. The water of the bath of Sun cannot be given to Brahmins.

Kāt. recommends the bathing of the weapon of the deity in case of a milder offence. According to DT, this means that actual deities could be bathed for heavier or grave offences and only weapons in the cases of milder nature. Pit. gives specific rules regarding the bathing of the weapons i.e. in the case of Durga it must be her spike that must be bathed. According to VP a copper-image of God Sun can be bathed as the weapon of Sun. (Āyudhagrahaṇam tāmrādinirmitādityamaṇḍalasyāpyupalaksanartham-VP. p. 213).

(b) The Water—Explaining Yāj. II. 112, Visvarupa points out that the accused person should be properly warned that the water of the baths of the deity is not ordinary water as any other water meant for quenching thirst. It is the water which may bring to a liar any adversities like poverty or a disease like leprosy which may be incurable even in hundred births. According to Virami-trodaya, the water must not be mixed with any other water. According to Mit. the water that is actually to be given to the person must be taken out in a separate vessel.

(3) Preliminaries :

After observing fast and other preliminaries, the Prādvivaka should bathe the stern deities like Durgā, Āditya etc., take the water of the bath of the place of the ordeal. He should then conduct the general rites i.e. invoking the Dharma etc. It must be observed that when Kośa is being tried for self-purification, tying of the Sirahpatra is not necessary.

(4) Mantras to be addressed :

Viṣṇu expects a simple declaration of the content that ' I have not done such an act', to be made by the accused person before drinking the water.

According to Yāj. the accused person must be given water after having made a hearing. As we have seen above, this hearing according to Viśvarūpa. is of a sort of warning to the accused person against underestimating the efficacy of and just playing with the water. According to Mit., however, this hearing consists of the mantras to be addressed to the water by the Prāḍvivāka and the Śodhya. The Prāḍvivāka should address the water with the mantra 'Toya Tvam ' etc. given by Pit. while the Śodhya should do it with ' Satyena mābhirakṣa' etc. given by Yāj. or with 'Satyānrtavinbhāgasya'

etc. given by Nār.

(4) The Trial;

The trial part of the ordeal is possibly the simplest one i. e. the accused person should drink the holy water while standing in a circle, facing Sun. Br. makes a curious statement in this respect. According to him the accused person must be kept under watch for three or five days to confirm that he has not resorted to any deceipt.

In fact, the provision made here is uncalled fro, particularly for the Kośa trial, because the Kośa is never forces on anybody. It is always recommended on the preference by the accused person, so the question of resorting to any deceipt really does not arise, but it is possible that, owing to its extra-simple form, the persons may be tempted to prefer it readily and then try their means to come out successful. Nār. has clearly warned against such a tendency, while Br. makes a regulation to see that no unfair means are used by the persons.

(5) Signs of the success or the failure of the trial :

Some royal or divine calamities befalling the person undergoing the trial within a particular period clearly indicates that he is guilty. These calamities are enlisted as follows.

(i) Some disease: we find that Kāt. has specified these disease i.e. fever, dysentery etc.

(ii) Fire.

(iii) Death of some relative—Vyavahārakalpataru quotes a stanza which explains the terms ' relative' in a legal sense. A relative means mother, father, son, brethren and wife having son. VN points out that while deciding a relative one should consider the persons coming upto five generations on the mother's side and upto seven generations of the father's side.

(iv) Arthabhramśa—SC points out that the word Arthabhramśa should mean loss of Son etc. because if we take it as 'loss of wealth', the word Dhanakṣayaḥ following next will be redundant.

In fact, the meaning suggested by the SC (i.e. loss of son) does not appear appropriate because that meaning is included in 'loss of relative'. It is therefore preferable to take Arthabhramśa in the sense of 'the loss of desired object'.

(V) Loss of Wealth.

(iv) Loss of cattle, corn or wealth.

(vii) Any major inauspicious happening. (Pratyātmikam).

Some of the important points regarding these calamities are pointed out by the

commentators and the digest-writers as follows:—

(i) Mit. holds the view that it must be a major calamity. Minor calamities are inevitable in human life and, therefore, the person should be declared innocent if there are minor calamities.

(ii) In case of a disease, it is pointed out by these writers that the disease must be belonging to the person as an individual. If the person is a victim of some general epidemic, that would not be indicating his guilt.

(iii) The calamities happen to be indicative of the result of the trial only if they befall within the recommended period.

All the writers, in general. have recommended a period of one to three weeks for any of the calamities to occur in case of a guilty person. A simple rule regarding the span of the time thus recommended is explained by Aparārka. A shorter or a longer span should respectively be co-related with the milder or the serious nature of the plaint. It should be a period of three weeks in the case of a very serious charge, while a period of fortnight is advised for serious charges. According to Aparārka thus, the Kośa can be considered for serious or very serious charges only.

Pit. has, however, recommended different spans. According to him, the calamity may befall within three, seven or ten nights or two weeks.

These spans, as it has been pointed out by the Mit. relate with the charges of lighter value. The value of a serious charge (i.e. more than 1000 Paṇas) should be divided into three categories. The lighter charges also similarly can be divided into three categories. The period of three, seven and ten days respectively correlates with the three kinds of the lighter charges.

It is rather interesting to compare the relative position of the Kośa and the water ordeal. Though both the ordeals have distinct forms of their own, knowingly or unknowingly, the writers have tried to connect the two ordeals.

We have seen that every ordeal has its main deity, besides Dharma—the General presiding deity of all the ordeals. It is interesting to see that later writers recommend the same mantras that are used in the water ordeal for the Kośa also. Both the ordeals have thus one main deity, i.e. the lord of waters. Though Kośa is essentially different in form, it is thus brought together with the water ordeal. Sukranīti has tried to bring these ordeals under one head. In cases of trail by water in certain tribes we find a fusion of two methods.

Śunaḥśepa And Dattaka Vidhāna

Considering the question of the category and the validity of the adoption of Śunaḥśepa by Viśvāmitra in the light of AB VII 15-18, Smṛtis, Dharmasutras, the commentaries on them and the Vyavahāra-prakāśa etc., the author concludes that Viśvāmitra's adoption was beyond all the rules. It was unique of its kind.

The story of Śunaḥśepa, the son of Ajigarta, has its traces in the Ṛg-Veda I.24-12-13 and V.2.7. In the Ṛg-Veda he is shown as rescued from some great danger and stands as a specimen of the results of the divine power.

The story of Śunaḥśepa, is further developed into a narrative by the Gāthās in the Aitareya Brāhmana VII. 15-18. As per the advice of Indra, Rohita wandered in the forest for the sixth year and came across a Brahmin called Ajigarta who sold his middle son Śunaḥśepa to him for hundred cows. Rohita returned to his father with Śunaḥśepa who was accepted by Varuṇa as a victim in lieu of Rohita. Then the sacrifice commenced duly. As no one was willing to bind and kill Śunaḥśepa, Ajigarta agreed to do both these tasks on payment of hundred cows for each job. When Ajigarta was about to kill him, Sunahsepa finding that no one could help him, prayed Prajapati, Agni and other deities. With his last prayer to Uṣas, his bonds became loose and belly of Hariscandra returned to normalcy. Visvamitra adopted Sunahsepa as his own son and named him Devarāta as he was given to him by gods. Ajigarta demanded Śunaḥśepa back but Visvāmitra refused to do so.

Against this background of the Brāhmana literature one has to face several questions in respect of adoption.

(1) Who gave Śunaḥśepa in adoption to Viśvāmitra?

(2) Is Śunaḥśepa a son of the variety of Svayamdatta in the language of Dharma-Sāstra or Kṛtrima or Datrima?

(3) Has Viśvāmitra adopted Śunaḥśepa as per the rule of Dharma-Sāstra?

(4) What are the valid rules laid down in respect of adoption of a son and what is its position in the later Dharma-Sāstra literature and Mahābhārata?

An attempt is, therefore, made in this article to find out legitimate answers to the above questions in the light of the commentary of Sāyaṇācārya on the Aitareya Brāhmana and the Manu-*Smrti*, Dharma-Sūtra literature, commentaries on the above mentioned Smṛtis and the digest work Vyavahāra Prakasa of Mitramisra and the Dattaka-Candrika of Raghumani.

In the Aitareya Brāhmana VII. 17, when Śunaḥśepa became free from his bonds, Viśvāmitra tells Sunahsepa not to become the son of Ajigarta and become the son of himself (Viśvāmitra). This gatha in the mouth of Viśvāmitra is important on this point of adoption. It further displays that Viśvāmitra has shown his willingness to adopt Śunaḥśepa, though in fact, Śunaḥśepa has not made the gift of himself to Viśvāmitra.

In this respect, it is pertinent to quote the important observations of Sāyaṇācārya who suggests that the choice of selection of a father was given to Śunaḥśepa by the other priests and he, in his turn, selected Viśvāmitra as his father and sat down on his lap.

If, however, the commentary of Sāyaṇa is understood in the proper spirit of the Dharma-Sāstra literature, one will have to admit that Śunaḥśepa has made the gift of

himself to Viśvāmitra and in that case he will have to be treated as the svayamdatta or self-given son.

It must also be emphasised in this very context that the portion of Sāyana's commentary has no basis from the Aitareya Brahmana on the point of svayaṃddatta of adoption. Besides, the gatha in the mouth of Viśvāmitra referred to above, clearly goes against this commentary of Sāyana. If, however, the text of the Aitareya Brāhmana VII.17 is to be respected, then one will have to admit that Sunahsepa is the Kṛtrima son of Viśvāmitra in the strict parlance of the Dharma-Saṣtra literature and particularly in the language of adoption.

From the above discussion, it is quite evident that there seems to be a difference of opinion in the opinion of the author of the Aitareya Brahmana and the commentator Sāyanācārya in treating Śunaḥśepa as a kṛtrima son and Svayamdatta son respectively.

Coming to the *Manu-Smṛti* X 105, we find that here there is reference to the story of Ajigarta and Medhatithi and Kulluka in their comments on this portion of the *Manu Smṛti* point out that the story of Śunaḥśepa is well known in the Bahvṛabrāhmaṇa.

It deserves to the demonstrated here that the story of Śunaḥśepa also occurs in the Vasistha *Dharma Sutra* XVII 33-35 and the same passage is also quoted by Nandapaṇḍita in his commentary entitled 'Kesava Vaijapanti on the Viṣṇusmṛti XV 22. Haradatta on the Āpastaṃba Dharma-Sūtra II 6.13.10 also refers to the story of Śunaḥśepa. In the Vasistha Dharma-Sutra, however, the topic under discussion is the variety of sons and Sunahsepa is introduced in the category of svayamdatta son. A reference to the Svayaṃdatta son also also occurs in the Manu-Smrti IX 177 and the *Yājñavalkya-Smrti* II 131.

It should be noted here that the expression — akāraṇāt in the text of the *Manu Smrti* IX 177 is explained variously by the commentators of the Manu-Smṛti, Yājñavalkya-Smṛti and Mitramiśra Meddhatithi passes over this point in silence. Kulluka explains the expression 'akaranat' as 'due to the feeling of hatred'. Aparārka on the Yājñavalkya-Smṛti II 131 (p. 738) educidates the reason as pātitya i.e. if the parents are treated by the society as outcastes, they have to abandon the son. Mitramiśra, however, in his Vyavahara-Prakāśa, assigns two reasons — first, Pātitya of the parents and second, if the parents are stricken with poverty due to famine etc. and are not in a position to maintain their sons, they are bound to sell or abandon them.

On a careful consideration of the different explanations offered by the commentators and the digest authors in the context of the story of Śunaḥśepa in the Aitareya Brāhmaṇa, one will have to agree with the explanations that is offered by Mitramisra in his Vyavahara-Prakāśa. Needless to say that all other explanation, though convincing, are to be rejected in the context of the story of Śunaḥśepa.

The text of the Manu-Smṛti IX 177 provides that he who, having lost his parents or being abandone by them, without a just cause, gives himself to a man is called a son self-given. If the concept of a svaymdatta son in the Manu-Smṛti followed by the

commentators of the Yājñavalkya is accepted along with the beautiful explanation of Mitramiśra quoted here, one will have to come to the pointed conclusion that Śunaḥśepa belongs to the category of a self-given son or Svayaṃdatta son.

It is also worthy of mention here that the word Svayamdatta also occurs in the other Smrti works and Brahmapurana quoted in the Dattaka-candrikā of Raghumani, Yama Smrti explains the word 'svaymdatta' as one who offers himself. Nārada uses the expression 'svayam copagatah' and Harita also explains the concept of Svayamdatta as sayamupāgatah. Raghumani also quotes a stanza from the Brahma-Purana in the Dattaka-Candrikā. All the explanations of these quoted works come very near to the expression mama eva upehi putratam in the text of the Aitareya Brahmana.

Mitramisra expression dattatma in his commentary on the Yājñavalkya-Smṛti II 131. He also explains this term in his Vyavahara Prakasa with further clarity.

From the authorities cited on this point, it would be fair to reasonably infer that Śunaḥśepa appears to be a son self-given to Visvamitra and not a kṛtrima or a datrima son. For the explanation of the works kṛtrima and datrima, it would be proper to quote the comments of Aparārka on the Yājnāvalkya *Smrti* II. 130 and 131.

If, however, the explanations of these words are accepted, then on will have to admit that in the eyes of the author of the Aitareya Brāhmaṇa, Śunaḥśepa would become a krtrima son and not the svayaṃdatta son. But Sāyana's imaginative observation finds a good support in the text of the Vasistha Dharma-Sutra XVII 33-35 and the explanations of the words akāranāt and svayaṃdatta also offered by the text of the Manu-*Smrti* and his Vyavahara-Prakasa.

It must also be shown here that the expression sparsayet in the text of the Manu Smrti IX. 177 is explained in the commentary Subodhini on the *Mitaksara* on the Yājnāvalkya Smrti II 131 by quoting the text of Amara in support.

As regards the explanation of the word Kṛtima, Pratāparudra in his Sarasvati Vilāsa refers to the different aspects of temtations like wealth, land etc. to tempt the child to become his own. It will have to be admitted here that this aspect of temptation, however, is absent in the explanation of the word kṛtrima offered by Aparārka and others.

It will have to be emphasised here that Viśvāmitra has not made any attempt to tempt Śunaḥśepa by making the offer of wealth or land any other objects of material interest, in order to adopt him as his son.

As regards the valid rules for adoption, we have the Manu-Smrti IX 168 which clearly states that he is to be known as the son given, whom the farther or the mother affectionately gives (to another) as his son in (times of) distress confirming (the gift) with water, the boy being of the same (varṇa with the person adopting).

The word sadṛsam in the text of the Manu-*Smrti* is understood by Medhātithi in the sense of 'equal in family and qualities and not by caste'. He further holds that even a kṣatriya can become a dattaka of a brahmin. This view of Medhatithi is not favoured by

Kullūka who holds that the word sadrsam refers to a person of the same caste. This view of Kullūka is further favoured by Nilakaṇṭha in his Vyavahāra Mayūkha by quoting the text of the Yājnavalkya-*Smrti* II. 133 laying down the adoption for the sons of the same caste.

The Vasistha Dharma *Sūtra* XV. 6-7 prescribes that one should adopt a son not remote as a kinsman, but just the nearest among his relatives. If however, there is a son with respect to an adopted son who is a remote kinsman, the adopter shall set him apart like a śūdra. It should, however, be noted here that Nandapaṇḍita in his commentary 'Keśava -vaijayanti' on the Viṣṇu-*Smrti*-XV-19 gives different readings which permit a boy who is remote as kinsman and not the nearest among the relatives as competent to be adopted by the adopting person.

If, however, all these rules of the Dharma-Sāstra are applied to the present case of Viśvāmitra adopting Śunaḥśepa as his son, one will very easily notice that the adopting person Viśvāmitra was not in any difficulty as such, since he was already having hundred sons to the credit. Moreover, the gift of Śunaḥśepa i e. Ajigarta and his wife. Śunaḥśepa also is not related to Visvamitra in any way. Besides, both Visvamitra and Sunahsepa do not come from one and the same locality or region. In addition to this, the Dharma-Sāstra literature allows a person to adopt a boy from his own caste. If this context is borne in mind, one will easily detect that Śunaḥśepa — the son of Ajigarda, belongs to the family of Angiras and hence a brahmin; while Viśvāmitra belong to the Kṣatriya caste. It is interesting to note that the Mahabharata XIII. 4 informs us how Viśvāmitra, originally a Kṣatriya, was elevated to the position of a brahmin. If the Mahābhārta context is taken into account, one will be convinced about the validity of the adoption of a boy Śunaḥśepa by Visvamitra. If, however, this context of the Mahābhārata is ignored, then one will easily appreciate the point that Visvamitra has thrown overboard all the rules of adoption laid down by the Manu-*Smrti*, Vasistha Dharma-Sutra, Yājnavalkya-Smrti and the view points of the later writers on adoption and Dharma Sastra. It will not be out of place if it is casually mentioned here that even the modern Hindu law of adoption also lays down restrictions in the matter of adopting a boy or a girl in respect of age, though the other conditions of the family, caste, region etc. are not favoured by the same.

To sum up :-

(1) Śunaḥśepa is not given in adoption to Viśvāmitra either by Ajigarta or by his wife.

(2) If the text of the Aitareya Brāhmana is to be respected, Śunaḥśepa would become a Krtrima son of Viśvamitra and not Svayaṃdatta or a Datrima son of Viśvamitra in the strict parlance of adoption.

(3) If, however, the spirit of the passage of adoption as maintained in the Manu-Smrtis. Yājnavalkya-Smrti, the commentaries on the Smrtis and the Vasistha Dharma-Sutra and Sāyana's commentary on the Aitareya Brahmana is to be respected, then Śunaḥśepa would be the Svayaṃdatta son of Viśvāmitra.

(4) From the foregoing discussion it is further evident that Visvamitra has set at the rules of adoption to be observed by the adopting person and the parents who want to give their son in adoption.

(5) The adoption of Śunaḥśepa by Viśvāmitra would become valid only if the context of the Mahābharata upgrading Viśvāmitra from the position of a kśatriya to the position of a brahmin is remembered by a careful reader.

(6) Mm. Dr. P.V. Kane, in his History of Dharma-Sāstra (Vol. III, page 661, quotes Vasistha Dharma-Sutra to treat Śunaḥśepa as a Svayaṃdatta son.

Svatva, svāmitva and dhanādhikāritva

From what has been read already it will have been evident that Indian jurists made a somewhat hazy distinction been *adhikāra* and svatva. Perhaps, conjecturing a stage in their thought which does not appear in so many words, the notion was that he who had a *dhana* as his *sva*, so that it was possessed of the characteristic of "ownedness by him", must have *adhikāras* in respect of it; for without some *adhikāra* svatva was meaningless. This would, of course, be to treat *svatva* in an applied sense lexicographically, for, as we shall see, both the mother and the cow are *sva* of the son and owner respectively. Leaving this problem aside for the present, we note that the concept operated in the reverse. In respect of whatever *dhana* a person had an *adhikāra*, that was his *sva* and was possessed of the characteristic of "ownedness by him".

Concurrence of svatvas

The distinctive feature of the Indian concept of Property, therefore, is the capacity of *svatva* to exist in favour of several persons simultaneously, not only identical *adhikāras* being shared, as in the case of co-owners, but especially where the *adhikāras* are inconsistent, and mutually exclusive). The number of *bhogas*, which is a compendious word meaning *bhogādhikāras*, "rights of possession, enjoyment, exploitation", was often used as a means of assessing the value of a *dhana* to the relevant *svāmi*. The fullest alienation was of asta-bhoga, "eight-bhogas". These were customarily *nidhi-niksepa-pāṣāna-siddha-sādhya-jala-akṣini-āgāmi*, "treasure, unclaimed property, rocks present sources of profit, accruing sources of profit, water, exitising privileges, privileges that may be conferred." "Trees over-ground and wells underground" are often referred to. Grants of a village may be *sa-daṇḍa-daśāparādha*, "accompanied with fines and the ten offences", i.e. the right to take fines from the villagers. For examples see Ind. *Ant*. VI, 200, 201. A particularly interesting example is in the Anbil plates of Sundara Cōla explained in K. A. N. Sāstri, Cōlas (Madras 1955), 578. The word *bhoga* occurs in other senses. An *eka-bhoga* grant is for the benefit of single individual and his successors; a *gana-bhoga* is under the control of the village assembly. In repect of piece of land there might be as many as five concurrent *svatvas:*

those of the king, ultimate proprietor and receiver of land-revenue and other profits from each tenure; of the *mūla svāmi* or *bhaumika*, the landholder), payer of land-revenue; of the mortgagee to whom he has mortgaged it; of the sub-mortgagee to whome the mortgagee had sub-mortgaged it; and finally of the cultivator to whom the sub-mortgagee has leased it. Early observers, such as Wilks, Dubois, Elphinestone, Patton, Chamier, were clear that the king owned concurrently with the *bhaumika*, and their reports (discussed in E. Sice. Essai sur la Constitution de la Propriete du Sol ....dans l'Inde, Pondichery, 1866), not difficult to reconcile, agree substantially with what is said by Sri Kṛṣṇa ans Jagannatha. See J. Grant's Inquiry (1791). See also Sri Kṛṣṇa on Dāya-bhaga (Col.) I, 10, at p. 18, on what a rāja buys when he buys a new *rājya*. Differences of opinion on this subject would not have been tolerable to Indian kings, and the view that jurists differed about it is not acceptable. The difficulties were caused by texts in Mimāmsā writers, utilised by some jurists (in particular Nilakantha, Vy, May., Kane's edn., p. 19), which explained that in the Visvajit sacrifice, which was intended to make the king ruler over the earth, certain items of property were not to be given, although the injunction was to give all he had. That Indian kings gave their kingdoms away in fact is certain: The *moksa=parisad* ceremonies in which Buddhist monks were given the kingdom and then allowed the king to redeem it at a fair estimation are referred to in J. Legge, *Record of Buddhistic Kingdoms*, 22—3; S. Beal, *Buddhist Records of the Western World*, I, 51—2; II, 261, 267, and elsewhare. Before the customs of redemption arose there was a problem whether the Earth was indeed within the king's gift. The mimāmsaka writers the Earth was indeed the sense of the entire land and its produce could not possibly by given as it was not in the king's power to give it; the rights of occupiers and tenants which he had disposed of, or had been disposed of before his time, had to be respected. From this very meagre and obvious rule it has been concluded that the king was thought by the Mimāmsā not to have been ultimated owner of the soil. This is incorrect, and similarly to interpret Aitareya B. VIII, 21, 8 and Satapatha B. XIII, 7, 1; 14—15, is mistaken. But the fact that the king was expected to confirm old grants and that only he could grant land to a deity, so that the bhaumika had to take his consents before alienating his interest in it, and the fact that even lesser grants made by others were made in reality with his authority (see Mimāmsā here, Sab. on J. VIII, i, 34, which more than balances the Visvajit passage), show which way fiacts really lay. Kane, whose opinion is of greater value than most, expressed his view in four places: edn. of Kātyāyana, trans, 121, n. on slokas 16—17; H.D. ii, 865—7; ibid., iii, 189, n. 243 (where he provisionally rejects the evidence of so great an authority as Mitra-misra in the Rājaniti-prakaśa (p. 271), and ibid., 196, 495. It is evident that, despite his (incorrect) hint that the British adopted one of two possible views because it was more "playing" (H.D. ii, 866), he really believes that concurrence of *svatvas* was the answer. Anglo-Indian cases are nothing to the point, whether they support or deny this view: legislation on the whole supports it, and independent India is far from departing from that tradition. K. V. R. Aiyangar takes far too pessimistic a view of the king's position in his intro, to Kṛtyakalpataru, Rājadharmak.

The possessory rights, provided they had a lawful origin, were of the same character, qualitatively, as the original right of ownership, and that the western distinction between dominus, "legal owner", and other interested parties would have been of no assistance to Indian jurists (rather a hindrance), is clear from so old an authority as that *śloka* which is constantly cited on the evidential value of *bhukti*):

na mūlena vina sākhā antarikṣe prarohati
āgamas to bhaven mūlam bhuktih sākhā prakirtitā

"Without the root no branch grows into the air; title must be the root, and possession is famed as its branch." In other words, the chain from the *mūla-svāmi* (*"root-owner"*) to the final, perhaps temporary, possessor must be complete, and each link is of the same qualitative likeness as the part of a tree, from root to twig. It is possible to overstress the similarity between the *mūla-svāmi* and the bailee), for example, for their *adhikāras* themselves are of different qualities: but that they seemed both to be *svāmis* is clear from the literature.

Svatva, svāmitva and svātantrya

A non-lawyer may be confused by the above demonstration. Where, after all, he asks, is the Owner in all this? If there are at any one time five *svāmis* of one plot of land, is not the *svāmitva* (or *svāmya*) merely *split up* between them? This is not to approach the problem in the Indian manner. As we have seen, they are all *svāmis*, but their *svatvas*, though all examples of *svatva*, are not identical. Nor is it a question of something approaching an "equity of redemption" which gives the *mūla-svāmī* his *svatva* in land which he has mortgaged in possession. The sentimental reality of that *svāmitva* was and remains a potent force in India; yet what makes him *svāmi* still is the fact that he can exercise *adhikāras* over it other than the one which has been used already—and, however *pratibaddha* his *svatva* may be, the quality of "ownedness by him" is still as much present as before the granting of the mortgage.

We are however no nearer answering the western reader's question until we have investigated a parallel but connected question, that or *svātantrya*. Here law and anthrophology share the field between them. The relationship between son and father and between wife and husband, and between subject and king, has been studied sporadically. No systematic definition of the special dependence in western terms seems to have emerged, for the studies are all incidental parts of much wider surveys. To grasp the point of this present brief survey the reader must be told that in a case of a mortgage or bailment, though the mortgage or bailee has a strictly limited *svātantrya*, "independence", with reference to the *dhana*, and the owver's *svātantrya*is limited precisely to that extent, if one were asked, "Who has *svātantrya* with reference to that field?", the answer would immediately be "the owner". On balance he seems the one who joins in his own person the essential features of what even western lawyers would recognise as Ownership.

One who is *svatantra* needs to ask no consent before acting. Pāratantrya, "non-independence", is the state in which all persons are born, and *svātantrya* is acquired by relatively few. The concept is not the same as *vyavahāra-yogyatva* or *vyavahāra-prāptatva,* the legal capacity to enter into binding transactions.

trayaḥ svatantrā loke smin rājācāryas tathaiva ca
prati varṇañ ca sarveṣām varṇānāṃ sve gṛhe gṛhī

"Three persons are svatantra in this world: the king, and also the spiritual teacher; and in every caste, caste by caste, the master of the house in his own house)." *svātantrya* comes with age, seniority, and the death of ancestors. A son is never svatantra while his father (some say his parents)) live. Upon becoming svatantra he will, if still a minor, be *aprāpta-vyavahāra* and therefore a protected person from certain legal standpoints). While his father is alive he is spoken of as "son" in this text):

asvatantrāḥ striyaḥ putrā dāsāśca saparigrahāḥ
svatantras tatra gṛhī yasya syāt tat kramāgatam

"Non-independent are women (wives), sons, and slaves together with the household. Independent there is the householder, to whomsoever it has come by descent (or, in order)." The son at *Mitaksara* low is an excellent example or *pāratantrya*; his birth-right and entitlement to partition of joint family property nevertheless leave him dependent upon his father in respect of the management of the family and the disposition of certain acquisitions of the father. Even when the father dies it is open to question whether he is *svatantra* with regard to the joint estate; the elder brother, if manager, will be. At Dāyabhāga law, undoubtedly, the brothers in such circumstances are each *svatantra* in his undivided share, and hence the difficulties of the jurists of that school in validating alienations of the undivided property without the coparcencers' consent. Even in the Mitākṣarā, where women were allowed property by inheritance and partition apparently without any trace of a limited estate, it is clear that they were not *svatantra,* and for their own protection had to seek the advice and authority of their protectors before entering into transactions. The inscriptional evidence from the peninula of India suggests that there were castes where female independence was highly rated, as well as more "orthodox" castes which followed roughly the *śāstric,* Āryan pattern. Where *svatva* and *svātantrya* are not combined, there arises a situation in which "full ownership" in the western sense is missing. But Property, as we have seen, is by no means dependent upon independence, and we must bear this in mind while considering early definitions of Property in India.

This brings us to a question at which we have hinted. In early times the absence of independence led to a popular conclusion, that the non-independent person had no *svatva.* The word *svāmī,* though undoubtedly meaning "possessed of sva", in fact was used throughout classical Sanskrit for "lord", "master", being synonymous with *prabhu,* "boss", and *pati,* "chief", "husband"). Ownership in the public mind was inseverable

from mastery, lordship, power, and the right and duty to protect. Naturally this popular notion is only a generalisation and a predominant idea, and could not effectively hamper legal investigations. But before the discussions to which we are coming it was thought that if a woman was *paratrantra* she had no freedom of disposition and *therefore* could not be a *svāmī* and *therefore* could not have *sva*. A subtle distinction between *dhana* belonging to the woman, and the woman's *svatva* seems to have been envisaged, which if it was mooted, came to nothing. Similarly with a slave, whose rights of possession and accumulation were commonly accepted in certain cases, and with a son, whose acquisitions came within his father's *svatva* but who was allowed certain perquisites at the father's option). Slaves evidently could inherit from their own fathers: Arthaśātra (Mysore edn.), 182 (trans. Shamasastry 207). It is evident that this facitlity, as that to acquired for himself what he earns in addition to his labour for his master, could be open to him only with his master's permission. Viv. Cin. 73 is plain on this, relying on Kātyāyana, 724 (where see Kane's note). N. 338. That the son's acquistions were *prima facie* the father's was the starting-point of Āryan law on the subject; the rules regarding self-acquisitions being a gradual amendment of that position. The text of Manu, *Manusmṛti* VIII, 416, stating that the wife, son and slave are alike in that their acquisitions are those of the man to whom they belong is quite extraordinarily frequently cited in mediaeval texts. It was thought that the female's *dhana* was owned in a subordinate and different manner from the *dhana* of the house holder.

The woman after all was *sva*, "own" wife. We have seen that the conception that the wife was property of her husband played a substantial part in Indian practice as it did in juridical theory. Other female relations, such as the daughter, were in the householder's power; the daughter was given or sold in marriage or otherwise, and it is clear that if a man were in debt he could sell or pledge not only himself but also his immediate kindred, including close female relations. The śāstra seems to have avoided discussing the nature of this *adhikāra* to sell or pledge one's sister, for example; it probably found no place in pure Āryan custom. However, it existed, and although the stridhana of a mother or sister might not be taken by a woman's sons or brothers to satisfy their debts), and their creditors had no access to it, it is evident that under some circumstances they knew that her assets were available for that purpose). The rules found in the Arthaśāstra and elsewher subjecting to punishment (somethings a light punishment) those who mortgage or sell relations are adequate evidence that such transactions used to occur. That children were always sold in times of famine is beyond doubt. And if relations could be disposed of it follows that their assets, if any, could be disposed of in similar emergencies. It is possible that women might themselves be sold, etc., only with their own consent. However, the very fact that consent could validate such a transaction seves to prove the nature of the *adhikara* and the extent to which *svatantrya* went in practice.

The ability of certain classes of slaves, and persons pledged for their own or others' debts, to redeem themselves (niskraya) is a feature of such legal institutions). The notion of debt was very peresive in ancient times and even the householder himself was believed

to owe certain debts to the devas quite apart from any vows he had voluntarily undertaken. Payment of these could be by various sacrifices, by which he was "redeemed". The general concept of a man's indebtedness from birth, the theory of the triple debt (or according to others, quadruple debt or quintuple debt), which can be paid by study, marriage, charity, etc. (K. iii, 415—6) is outside the scope of this paper, as is the Hindu law of Debt itself.

Whatever a person could redeem himself from secular bondage by payment it is evident that *svatva* could exist without *svātantrya*. The question may arise, however, whether there could be such a thing as limited *svātantrya*, i.e. that a person who was *paratantra* in general, as a wife, might have *svātantrya* with regard to his or her assets. Progress into such an investigation seems not to have kept pace with investigation into the nature of *svatva*. Perhaps this was because until will into the 16th century *svatva* was anchored to *yathesta-viniyoga*, and of course it was useless to posit *svatantrya* of any sort in a person who possessed the right to dispose of sva providing only that the consent of another person was given to the disposition. And savtantrya being itself so varied an expression of the absence of dependence, a sociological as well as legal notion, it was natural that it *svatva* was to be utilised as an entity in legal discussion it must be detached from variable conditions under which the *adhikāras* associated with it might be exercised.

SVATVA RAHASYAM

The famous *Navya-nyāya* school in Bengal eclipsed in brilliance and prestige all other Indian educational products; consisting of a succession of brilliant teachers, themselves the fruits of that orthodox system of *guru-śiṣya-paramparā* which enabled education to be the common enjoyment of successive generations of persons of like inclinations and often of close neighbourhood, they found in Logic the best medium of instruction of elicit the mental gifts of the cream of the intelligent youth of the country. The object of this paper is to give a brief description of a treatise which was produced while that school was in its prime. A typical product of the *navya-nyāya* technique, a specimen of the tools with which the masters cultivated learning, the *Svatva-rahasyam* ("The Secret of Property") is characteristically anonymous and challenges those who may be interested in it to attribute it to its author, or at least to its proper period. This is a task which can be attempted by one who is interested in the *subject matter* of the work, but his suggestions can only be tentative until a master of the *navya-nyāya* itself has confirmed or rejected the attribution upon purely stylistic grounds—a possibility open to one who was studied the voluminous literature (most of which is still in manuscript) on Logic in general, and to no other.

The *Svatva-rahasyam* has a peculiar fascination. Its topic is, the present writer believes, the only one which directly links Logic with practical everyday affairs, and one of the very few topics in which the hyper-realism of the Logicians will tolerate the condominium of a *śāstra* and a *Smṛti* other than their own. In dealing with Property the *naiyāyika* is

obliged to admit the *pramāṇa* of the texts of the *dharma-śāstra*, and we have the entertaining picture of a confirmed observer of experience grapping with authorities which in the majority of cases are several removed from direct experience. And the subject of Property occupied the minds of the "new logicians" from the time of the celebrated Raghunatha Siromani (c. 1520-50) at the latest until Jagannātha Tarkapañcānana (c. 1790) at the earliest; and between those periods a number of highly interesting speculations were put forward in a number of works and tested in turn by reference to law and to practice. The series is not quite complete, since vital links have disappeared, but one, apparently, of the earlier works after Raghunatha was the *Svatva-vicāra* (tentatively dated c. 1600-10), which has been edited in translation in the B. S. O. A. S. for 1956 (Vol. xviii), and of the remaining works and fragments, Jayarama's *Svatva-vādārtha*, parts of the works of Gokulanātha, and lastly the *Svatva-rahasyam* itself are shortly to be prepared for publication along with the Svatva-vicara.

Apart from the views which the author expresses there is no internal evidence of any sort which would assist a close dating of this work. We are forced therefore to rely upon the views expressed for our purpose, and this can, within certain limits, be a suitable method to employ, and this can within certain limits, be a suitable method to employ. The practice of all members of this school was to mention, so far as was relevent and consistent with brevity, the views of predecessors : and this practice, essential for scholarly productions, was adhered to with exceptional rigidity where the previously-published views were to be refuted if the author's these was to be sustained. Any other course would have led to ridicule. If therefore we find that a view is not mentioned by an author which conflicts with his own, or which would have been of assistance to him, we are justified in supposing that the view was not known to him; and the only exception arises in a case where the view in question was notoriously unpopular and did not at that time require to be mentioned, since refutations of it were too trite to repeat. By this method we can go a long way towards attributing the svatva-rahasyam to its author, although as yet we are unable to go to the final stage in the process.

But first a few words on the work itself. It is found in very few manuscripts and all are in poor condition, unless we except the one described by M. M. Haraprasad Sastri in his *Notics of Sanskrit Manuscripts* (New series), ii, p. 226 (no. 259), which cannot be traced. Not one of our mansripts has a proper *incipit* with invocation; the colophons are not very helpful, except the three Sanskrit verses which are printed by Haraprasad Sastri from his "find" and which, apart from a perhaps not altogether useless praise of Kṛṣṇa give no plain information of which we can make use at this stage. The Madras manusript (R. No. 3217) in Grantha characters is called *Svatvavāda*, which seems to be a librarian's lable, since the text is a substantial fragment from the middle of our work and lacks both incipit and clophon. Ms. IO, 861 commences atha *svatva-vicāraḥ* and ends iti *svatva-rahasyam;* Ms. A.S.B., I.B. 26, a close relation of the preceding, reads likewise; Ms. A.S.B., G. 3913, which is perhaps a better manusript, omits the atha *svatva-vicāraḥ* and ends iti svatva-vicara-(followed by an creasure); Haraprasad Sastri's manuscript commenced

without the incipit, as does the last-mentioned, but ends iti svata-vicarah G. 3913 is labelled *svatva-vicāra-rahasyam*, although we cannot be sure upon what authority.such a tille, though not impossible, would require some explanation, and upon the whole I think that *svatva-rahasyam* is the most appropriate title that could be bestowed upon this work. the differences between the readings in the manuscrips are multitudinous, and some are very difficult to account for unless the author's dictation was differently reproduced by different pupils. But that is a subject for another disquistion.

The work may be divided into six chapters, each dealing copiously with an aspect of the problem; all these aspects having been discussed, it would appear, very largely by previous writers. Some, we can see, were of great practical importance, and large sums of money might change hands should a Judge follow on rather than another solution in a given dispute. The contents of the chapters may be summarised as follows :

Chapter I : Admission that Property is a distinct 'category', assertion that Ownership is another 'category'; the sixth (i.e. genitive) case denotes either; investigation of the denial that Ownership is a 'category'; assertion that Property and Ownership are one and the same 'category'.

Chapter II : How is Property produced ? By abandonment, and by mere *pātitya*, for example. Investigation of the father's death as the 'cause' of his sons' Property. Life is not a cause of Property. The Property of one person obstructs the Property of another. The father, etc., are succeeded by their descendants because the extinguishing of their Properties permits a particularly qualified *birth* to 'cause' something characterized by the successor's Proverty.

Chapter III : Investigation of life being a general cause of Property. The text of Gautama, "wealth is taken by birth alone", refers to the birth of children to slaves and cattle, and not to Property being produced by the birth of sons, etc., in themselves. In fact, the 'cause' generally of something characterized by the Property of a determinator is the absences of death, not life.

Chapter IV : Discussion of the question whether an estate descends to sons as a unitary or a fractional Property. After scrutinising the prevailing view that Property in an estate is unitary he asserts that it is fractional from its inception and that the casting of lot merely manifests a pre-existing Property in the sharer. The text, "wealth is common between spouses", merely gives the wife authority to make certain uses of her husband's property. Sons have no right in their fathers' property during his lifetime. 'Buried treasure' is defined as "the capacity to be Property when every element of Property has been extinguished which was characterized by the existence of a Property over the whole other than that of fhe finder."

Chapter V : The 'cause' of Property in a gratuitous transfer is not gift but acceptance. There can be a theft of an object which does not belong to anybody.

Chapter VI : Discussion of relinquishment. There are six sorts, viz. sacrifice, oblation,

gift, sale, distribution and renunciation. A relinquishment which is followed by Property is a gift. The definition of gift as "that transaction which gives rise to the extinction of Property and produces the special Property of another" is wrong. Appropriation is of four kinds, acceptance, finding purchase, or exchange. In the *vṛṣotsarga* the Property of the releasor is extinguished. The release of a tank is both *homa* and a *dāna*. *Śrāddha* is not a conjunction of gift and sacrifice, but is merely oblation.

It does not require much searching to discover that a work which contains these opinions, expressed in the manner in which they are expressed, is later than a group of writers which have been dated in the period c. 1610—50. Our author is certainly later than Kamalākara, and almost certainly later than Mitra Misra; he is definitely later than Viśvanātha Nyāyapañcānana, Ramabhadra Sravabhauma, Jayarāma Nyāyapañcānana and Raghudeva Nyāyālankāra. He is quite clearly earlier than Gokulanātha, who refers to him—but this is of little assistance to us since we do not know Gokulanātha's date for certain. That he is obviously earlier than Sri Kṛṣṇa Tarkālankāra (c. 1750) would be useful to some extent if there were not better evidence at our disposal. In fact, it seems quite evident that Vācaspati Bhaṭṭācārya, the paternal grandfather of Jagannātha Tarkapañcānana, had studied this subject very fully, had read this work and the *Svatva-vicāra*, and evolved a new synthesis of his own. This viewpoint would certainly have been mentioned in the *Rahasyam* if it had been known to its author, but since it seems to presuppose reasoning such as is to be found in the *Rahasyam* it is very likely, if not certain, that Vācaspati Bhaṭṭācārya was a successor and not merely a contemporary of our author. The date of Vācaspati Bhaṭṭācārya is not difficult to fix. Jagannatha was a very old man wh ı he complied the *Vivāda-bhangārṇava*, and lived thereafter well over his century. It seems that he was born about 1690, and this must be his grandfather's *Sloruit*, or if not, then it fell not long before that date.

In the interval between c. 1650 and c. 1690 brilliant *navyaniayāyikas* were not rare, but amongst those of front rank two stand out immediately : Mathurānātha and Gadādhara. Mathuranatha was related to Rāmabhadra Sārvabhauma as pupil's pupil, and, if the identification were correct, this might be significant, since undoubtedly the author of the *Rahasyam* was acqainted with a Ramābhadra's views, which seem to be the immediate predecessors of his own. Again Mathurānātha was related to Jayarāma Nyāyapañcānana as pedagogical nephew, and Jayarama's attitude to the subject, though not lacking in zeal, lacks the form and profundity of out author's. However, I am not prepared to be certain that Mathurānātha was the author of our work Gokulanatha refers to him as *Jyāyān* and I am not aware that this was a title of Mathuranatha. Until better evidence of ascription appears, or evidence destructive of the suggestion is produced, I am prepared to hazard that the author of the *Svatva-rahasyam* was Gadādhara. A discussion of the merits of his approach to the problem in comparison with his predecessors and successors will, it is hoped, appear shortly in another place.

Svatva-Vigāra

The work which is published for the first time below was translated by me with an introduction and notes at *B.S.O.A.S.* 18/3 (1956), pp. 475-498. In the interval I drew attention to another work in the short series of treatments of Property, the *Svatva-rahasya*, in the Centenary Volume of the *Annals of Oriental Research*, Madras, pp. 42-48. About half a dozen treatments of Property exist, most of them unpublished, as explained in those articles. There is also the Svatva-janakata-vāda to be found in the *Vādavāridhi*, published in the Chowkhamba Sanskrti Series (pp. 34-5). In order to obtain a better idea of the date of these works it is desirable of place them together and compare the development of ideas; but before that can be done all must be published. Perhaps Dr. Herambanatha Chatterjee Śastri, who has developed a reputation in this rather special field where Dharmaśāstra and *navya-nyāya* overlap, may further this branch of study amongst his students?

The date of this present work is evidently earlier than the flowering of the *navya-nyāya* techniques in the field, as exemplified in the *Svatva-rahasya*. A work called *Svatva-vicāra* is in the Calcutta Sanskrit College Library (8/128) and it is dated 1693. I was not able to consult that text. The precent edition is based on I.O.L. Skt. MS. 861 (Egg. 1538) and Asiatic Soc. Bengal MS I. B. 26.

Now that readers have the Sanskrti text in their hands they will be able to form their own impression of my translation. Since I published that I have changed my mind about certain passages. At p. 487 n. 6 I would draw attention to Medhatithi on Manu IV, 226, VIII. 197 and XI. 11 (12) . At p. 488 n. 7 I would refer to Yājnavalkya cited in the *Vivāda-ratnākara* and the *Vivāda-cintāmaṇi*, text 192 at p. 48 of Jha's translation of the *Vivada-cintāmani*. At p. 489, text to notes 2-5 I should experiment with an alternative rendering : 'It is indeed incorrect to ask why we require the consent of all.... whereas the requirement of the consent of all presupposes that (according to our view) all have property in the whole, for this rule is based on a text, as is the case of the consent of neighbours to a sale of land. For when the matter is logical there is not text, and if the matter were logical, etc.' At pp. 490-1, the last sentence onwards on p. 490, I would experiment with an alternative rendering, 'If one said that it would be going much too far to posit as the cause the death of the *grandfather* merely on the ground that there must be an exception in the nature of an anomaly when the Property of a son takes place as a result of acceptance, purchase, etc., in view of his capacity to be a transferee of an item sold, etc., by his father, I entirely agree, for when, during the grandfather's lifetime, Property is produced in a son born after the father's death, it is universally esablished that very relationship of cause and effect (produces) the property in all itesm created after the death of the said grandfather on the part of the said grandson. Moreover, there is fear of an anomaly by positing a relationship of cause and effect in the manner previously mentioned. No...' At p. 494, the last sentence of (2) : 'Moreover, your view that knowledge that 'this is mine' manifests property is in conflict with the miamisa.' In VII perhaps 'an unseen factor' is better than 'the supernatural'.

These works, for all their technicality, have a special call on Sanskritists' attention. This is the field (along with Marriage) in which the logicians applied themselves to factually verifiable topics. Yet, if they ventured into law, they had to use texts. Many of these texts were of doubtful meaning, since contact with the societies in which they first appeared had long been lost. Jurists used their work, for Mitra Misra and others show an awareness of this kind of investigation. There is no reason to doubt but that jurists encouraged these studies in order to produce generalised propositions which could sever to throw light upon new Problems, for which the *Smṛti* texts alone could not be relied upon. Colebrooke found Bengali jurists fully persuaded that this class of research was valid for the furtherance of legal research. It is the coincidence of a theoretical enquiry, divorced from practical needs, with the practical urgenices of the jurists which produced this rather difficult literature, and it deserves to be rescued. A comprehensive, serial, treatment along the lines I suggested in 1956-7, is a desideratum. It is sad that the British period ultimately, though indirectly, put an end to such discussions : but they have an educational value and should not be allowed to slide into oblivion.

Svatva-Vicāra

1. atha svatvam nirupyate. tatra "caitrasyedam dhanam na maitrasya" ityādi-pratyayāt svatvam padārtha-viśeṣa iti bahavaḥ. "mamedam" iti jñāna-viśeṣa-janya-samskāra iti tu navyāḥ.

2. tatra svatvam prati kvacit krayaṇasya, kvacit pratigrahasya, kvacit pūrvādhikāriṇaḥ maraṇa-sannyāsa-grahaṇa-pātityānām, kvacit tyaktavastūpādanasya ca hetutvam.

3. para-svatvāspadi-bhūta-dravye cauryasyāpi hetuatvam ityapi kaścit. "kāraṇatvam tṛṇāraṇi-maṇi-nyāyena; anyathā krayaṇam vināpi pratigrahādinā svatvotpādād vyabhicārāpatteḥ. tathā ca svatvāvyavhitottara-svatvam prati teṣām hetutvam. tatra cauryāpahṛta-dravyasya caurena dāne vikraye vā kṛte uttarādhikāriṇaḥ svatvam siddhyatyeva, kintu kartā pratyavaititi Dāyabhāga-kāra-prabhṛtayaḥ." atra vivadante bahavah. svatvavti svatvānutpatteḥ katham ekasya pumsaḥ svatvavaty aparasvatvotpādaḥ ? katham vāhṛta-dravyasya pūrva-svāmi-grahaṇe vinā caurānumatim pūrva-svāmino na pratyavāyaḥ ? na ca cauryam eva pūrva-svāmi-svatva-nāśakam, mānābhāvāt, dvitiya-doṣānuddhārāc ceti.

4.(i). atra ca pitṛ-maraṇādhitaḥ tat-svatvāspadi-bhūta-yāvad-dravye sakala-putrāṇām svatvam jāyate. teṣām vibhāgottara-tādṛśa-svatva-nāśāntaram tat-tad-dravya eva tat-tat-putrasya gutikā-pātādes tu svatva-janakatvam iti bahavaḥ. anye to guṭikā-pātanam tat-tat-svatva-vyañjakam, na tūtpādakam, tathā ca pitṛ-maraṇādito vastu-gatyā vibhāgānantaram yad dravye yasya svatvam bhavatitatraiva tasya svatvam jāyate, na tu sarvatra sarveṣām anumatiḥ katham tarhi yat-kiñcid-dravyasya dānādau sarveṣām anumatiḥ katham apekṣitā, asman mate tu sarvatra sarveṣām svatvam astīti sarvā-numater apekṣeti vācyam, bhū-vikraye pārśva-vartyudāsīna-sam-matrivat tasya vācanikatvāt; api ca nyāyaprāpte's rthe vacanābhāvāt, tadarthasya nyāye tādṛśa-vacana-vaiphalyāc ca.

(ii) pitrupārjita-dhana eva putra-svatvam prati pitṛ-maraṇasya hetutvam. pitāmaha-dhane tu pitari jivatyapi putra-svatvotpādaḥ, "tatra syāt sadṛśam svāmyam pituḥ putrasya cobhayoḥ" iti vacanāt. ata eva pitāmaha-dhane putrasya pitrā saha vibhāgo' py uktaḥ. kiñca jīvati pitari tatra putra-sammater apekṣā na syāt. na ca tat-puruṣiya-svatvām prati tad-anya-puruṣiya-svatvasya pratibandha-katve katham pituh svatvavaty aparasya svatvotpāda iti vācyam. pūrvādhikāriṇo dānavikrāyasyottaradhikāri-svatvam prati viśiṣya hetutve siddhe, kṛtam etādṛśa-pratibandhya-pratibandhaka-bhāva-kalpaneneti. api ca tādṛśapratibandhya-pratibandhaka-bhāvasya prāmāṇikatve svāmi-svatvavati dhane patni-svatvotpādo no syāt. na ca tad-dhane patni-svatvotpāda eva mānābhāva iti vācyam, "dampatyor madhyagam dhanam" iti śruits tad-dhane patnisvatva-siddheḥ. *madhyagam* avibhājyam, vibhāgānarham iti yāvat, tathā ca tādṛśa-dhane patnyāḥ svatvānutpāde 'vibhājyatvasya pradarśanam kim iti kṛtam?

(iii) na ca tarhi pitṛ-svatvāspadibhūta-dhane putra-svatvam prati pitṛ-maraṇasya hetutva-bhangaḥ syād iti vācyam. pitṛ-dattavikrita padārthasyottarādhikāritvāt pratigraha-krayādi-janya-putra-svatvasyāpādād vyabhicārātmakoddhāraḥ syād iti pitāmaha-maraṇasya hetutvakalpanam eva mahagauravam iti cet, satyam, pitamahe jivati pitṛ-maraṇottara-jāyamāna-putra-svatvotpade tādṛśa-pautrasya tādṛśa-pitāmaha-maraṇothara-jāyamāna-tat-tad-dhana-svatvam prati tādṛśa-hetu-hetumad-bhāvasya sakalatvābhisiddhatvāt. kñica pūrvokta-yuktyā hetu-hetumad-bhāva-kalpanena vyabhicārāśanketi. tad asat, tat-puruṣiya-svatvm prati tad-anya-puruṣiya-svatvatvena pratibandhakatvāt. na cokta-kramena pitṛ-mara-ṇāder hetu-hetumad-bhāve kṛtam tādṛśa-pratibandhya-pratiban-dhaka-bhāvādareṇeti vācyam, pituḥ pātityasya tat-sannyāsa-graha-ṇasya viśiṣṭa-hetutve mahāgauravam iti lāghavāt. tat svatvāvacchin-nābhāvatvena betutvam iti.

(iv). na ca tarhi svāmi-svatvavati dhane katham patni-svatvotpāda iti vācyam, svāmi-dhane patni-svatvānutpādāt. anyathā pitṛ-maraṇottaram mātari jivantyām putra-svatvānutpāda-prasangāt tat-puruṣiya-svatvam prati tad-anya-puruṣiya-svatvatvena prati-bandhakatvāt. na ca svāmi-maraṇasya patnī-svatva-nasam prati hetutvam, mānābhāvāt, tathā-kalpane 'tigauravāc ca. rarhi "dampatyor madhayagam dhanam" ity atra kā gatir iti cet, satyam, stri-dhane stri-svatva-sattve 'vivādāt, tatra ca svāmino 'pi svatvam tiṣṭhati, striṣu svāmi-svatva-sattvāt. tādṛśa-dhanasyaivāvibhājyatvam iti kṛtain pallavitena.

5(i). pratigrahasya svatvotpādakatvam iti matam keṣāmścit: tan na ramaṇiyam. tathā sati kāśi-stham puruṣam uddiśyātra kenacid dāne tādṛśa-dhane tasya svikarābhāvena svatvānutpādād asvāmikam eva tad-dhanam syāt. tathā ca tad-chanāpahāre pratyavāyo na syād iti. atha tatra pūrvādhikāriṇā tu vartata eva. anyathā yam uddiśya tad-dhanam pūrvādhikāriṇā tyajyate, tad-anyena tādṛśa-dhanasyāpahāra-karaṇe tad-anyasya pūrvādhikāriṇā na daṇḍaḥ syād, iti cet, satyam. etādṛśa-svatva-kalpane mahāgauravam syād iti tasmāt para-svikārasya svatva-vyañjakatvam kalpyate na tūtpādakatvam iti. na ca "dadāni : dadasva"

iti vinā yad dānam kṛtam tad vaidham na bhavatīti vācyam, "manasā pātram uddiśya bhūmau toyam viniḥkṣipet" iti śrutyā tad-dānasyāpi vaidhatvāt.

(ii) atra kecit svikārasya svatva-vyañjakatvam svatvasyātitikta-padārthatvam vinā na sambhavati, tasya svatvotpādaka-hetutve "mamedam" iti jñāna-janya-samskāraḥ svatvam iti, jñāna-samskārayoh karya-karana-bhavad eva prakrta-nirvaha iti. athaharya-jnanasya na samskārakatvam, tadā āhārya-jñānam iti "mamedan" iti jñāna-janya-samskārasya svatvatvabhāvāt. tādṛśa-vijātiya-samskārama prati vijātiya-jñānatvena hetutvam iti, hetu-hetumad-bhāvam vinā na niskrtir iti cet, tatha 'pi tvan-mate' tirikta-padartha-kalpanam eva mahagauravam. knca tyagasya svatvanasakatvam asman tādṛśa-nasya-nāśaka-bhāvād eva prakṛta-nirvāhah. tvanmate svatvasyātiriktatvāt svatva-nasam prati tyāgasya svātantryeṇa janakastva-kalpanam eva mahāgauravam. api ca "mamedam" iti jñānasya svatva-vyañjakatve Mimāmsā-virodhiḥ.

(iii). tathā hi devānām yāge 'dhikāro' sti. tatra dhi-japta-devatoddeśyaka-havis-tyāga eva yāgah. tathā "devatānāṃ, na mamedam" iti jñānāvyavahitottara-kāle "mamedam" iti jñānasambhavat. no tatha sambhavah. tatra "na mamedan" iti jñānasya svatva-janakatvam sambhavati. svatvavyanjakatve tesam anadhi-karah kim iti cet, satyam, vācanikatvāt. tasya tvan-mata eka-deva-toddeśyaka-havis-tyāge 'nyasya devasyāsambhavāt, katham devasya yāga sāmānyādhikārah ?

(iv). api ca yadi "mamedam" iti jñānasya janakatve "manujebhyas tathātmana" iti śrutes tatrātma-śrāddhasyāpi sattvāt tatra "mamedam n mamedam" iti jñānasyaikadā 'sambhavāt katham ātam-śrāddha-siddhiḥ? na ca tatrātmanas tatra dravye tyāga eva bhavatiti vācayam, tatra śrāddhasya dāna-yāgātmakatvam iti Sūlapāṇi-kaṇṭharaveṇoktatvād iti, kevalatyāgasya śrāddhatve śrāddham jagatām eva syād iti vadanti.

6. atha svatva-nāśam prati kvacit maranasya, kvacit sannyāsa-grahaṇasya, kvacit pātityasya, kvacit tat-svatvāśraya-dravya-nāśasya, kvacit tyāgasya, kvacid vikrayayanasya, kvacit kālaviśeṣasya hetutvam.

7. Ittahañca yatra sva-svatvāspadibhūta-dugdham dadhi jātam tatra katham tādṛśa-dadhiṣu svatvorpādaḥ, pūrva-svatvāspadibhūta-dugdhasya nāśāt? atha tatra dugdhārambhaka-paramāṇor eva dadhyārambhakatvāt tādṛśa-pramāṇu-svatva-vidyamānatvāt, tādṛśaparmānsusvatvād dvyaṇuka-svatvotpādaḥ, dvyaṇuka-svatvāc ca tādṛśa-traśareṇu-svatvotpāda ity avayava-svatva-krameṇāvayavi-svatvotpattir iti cet, satyam. tathā sati tādṛśa-paramāṇuto jāyamāna-ghaṭādiṣu tat-puruṣiya-svatvotpatti-prasangaḥ. na hi tādṛśa-para-māṇau savtam tadānim nāstiti sambhāvyeta, tadānim tādṛśa-svatva-janakābhāvād svatva-sambhave pratigrahader api svatvajanaka-tvapatheh. atra vadanti kala-visesa-sahakarena tādṛśa-paramāṇuṣu svatvasya nāśaḥ iti, ghaṭādiṣu na svatvopatti-ambhāvanāpiti. nanu kāla-viśeṣasya svatva-nāśakatvam kvacana dṛṣṭacaram iti cet, satyam, svāmisamksam balād bhūmer āharaṇe dvidaśa-vatsara-madhye svāmino 'vivādina etasya svatva-nāśa iti tatra kāla-viśeṣa-sya svatva-nāśakatvam iti; atha tatra

vilakṣaṇa-bhogād eva tasya svatva-nāśaḥ, na tu kālaviseṣāt, tathātve bhogam vinā 'pi svatva viśeṣasya svatva-nāśakatvāt. na ca tatra pūrva-svāminaḥ svatvam tiṣṭhatyeveti vācyam, tathā saty uttara-kālam tādṛśa-dravye aupā-dānika-svatvānutpādāpatteh.

8. atha tat-puruṣiya-svatvam prati tad-anya-puruṣiya-svatvasya partibandhakatve puṣkariṇi-tyāge sarvoddeśyaka-tyāgena sarveṣām svatvotpāde, tādṛśa-puṣkariṇi-tyāga-kāle 'vidyamānasya tad-uttaram jāyamānasya pumsas tādṛśa-jale svatvānutpāda-prasangaḥ. na ca tatra sarvoddeśyaka-tyāga-mātram kriyate. nahi tena karmaṇā sarveṣām svatvotpāda iti vācyam, tadudeśyaka-tyāgasyaiva tat-puruṣiya-svatva-janakatvāt. katham anyathā ? kāśi-stha-puruṣoddeśyaka-dravya-dāne kṛte tvan-mate tasya svikārābhāvena svatvā-nutpādāt, tādṛśa-dravyasya kenacid apāhare, tasya pratyavāyo na syāt iti cet, satyam. tatra "na mamedam kintu tasya pumsaḥ" iti jñānam na dātuḥ svatva-nasah sampradanasya svatvotpattir vā. atra tu "na mamedam" iti jñānam bhavati, na tu "sarveṣām bhavatu" iticchā bhavati. katham tarhi puṣkariṇi-dānasya sarvoddeśyakatvam iti cet, satyam. "sarveṣām bhogāya bhavatu" iticchā 'piti veśeṣaḥ. ata eva sarvoddeśyaka-tyakta-jalāśayasya jalam svayam api gṛhṇāti. brāhmaṇoddeśyaka-tyakta-suvarṇasya tasyāyam āśsyah : "brāmaṇaśyedam bhavatu, na mama" iticchā bhavati; atra tu " sarveṣām bhogāyetyeva" iti mahān viśeṣaḥ. api ca sarva-svatvoddeśyaka-dānam api na sambhavati, "pariṣad-dattam adattam" iti-pariṣad-adhikaraṇa-virodhāt, nānoddeśyakam eva dānam na sambhavatiti tad-arthāt. atha tarhi "brāhmaṇebhyo dade" iti katham vākyam iti cen, na kartavyam eva tathā vākyam, kintu"brāhmaṇāya dade" ity eva kartavyam iti samkṣepaḥ.

ŚANKHA-LIKHITA

The *Dharmaśāstra* of Sankha-Likhita is a very ancient one. Kumārila in his *Tantravārtika* (p. 179) tells us that the *Dharmasūtra* of Sankha-Likhita was specially studied by the Vājasaneyins (i.e. by students of the white *Yajurveda*). The *Tantravātrika* also quotes a few words from the work of Śaṅkha-Likhita, which constitute an *Anuṣṭubhpāda*. The story of the two brothers Śaṅkha and Likhita occurs in the *Mahābhārata, Sāntiparavan* ch. 322. The *Yājñavalkyasmṛti* (I.5) enumerates Śaṅkha-Likhita alongwith Gautama and Hārita among the writers of *Dharmaśāstra*. The *Parasarasmṛti* (I.24) says that in the four ages. *Kṛta, Tretā, Dvāpara* and *Kali*, the ordinances of Manu. Gautama, Sankha-Likhita and Parāsara are to be respectively followed. Commentators and authors of digests from the times of Viśvarūpa down to the latest quote very largely from Śaṅkha-Likhita. Viśvarūpa says that Sankha and Likhita pondered over the *dharma* promulgated by Manu and composed their work, after drawing upon the *Veda*. A considerable portion of these quotations is in prose. Hence it appears that the *Dharmasūtra* of Śaṅkha-Likhita was once available, though it has not yet been discovered. Therefore it is highly desirable to collect together from the numerous books on *Dharmaśāstra* the quotations attributed to Śaṅkha-Likhita. In the following pages an attempt has been made to collect from a few well-known works the fragments of Śaṅkha-Likhita and to reconstruct the *Dharmasūtra*. Though the following reconstruction is far from professing to be exhaustive, it will. I hope, serve as a basis for

future research and is sufficient to convey an idea of the character and contents of the *Dharmasūtra* of Śaṅkha-Likhita. Jivananda (collection of *Dharmaśāstras*, part II, pp. 344-74) printed in 18 chapters and about 330 verses a smriti of Sankha and a *Smṛti* of Likhita in 92 verses (part II, pp. 375-82). The same text of the Sankha-*Smṛti* has been published in the collection of *Dharmaśāstras* by M.N. Dutt (1988, vol. I) and in the Anandasrama edition (1905). The last edition also contains a laghu *Sankha-Smṛti* in 71 verses and a Śaṅkha-Likhita-*Smṛti* in 32 verses. It is obvious that these are later works. The *Sankha-Smṛti* in 18 chapters seems to be comparatively an early work. The relation of the *Sankha-Smṛti* in verse to the *Dharmasūtra* seems to be this. The versified *Smṛti* is a paraphrase of the already existing work in prose (vide Nos. 56 and 61, 69-70, 93-94, 199-200). It is not unlikely that the original Dharnasūtra also contained a few verses as Āpastamba's sūtra does now (e.g., No. 105). The prose Sankha allowed a brahmana to have a sūdra wife (64), but the verse Sankha does not do so (No. 65). Even so early a writer as Viśvarūpa regarded the prose and verse portions as the compositions of the same author (vide No. 379). About fifty verses from it are quoted in the *Mitāksarā*. A few prose passages occur in the eleventh and twelth chapters of the work, one of which is quoted even by so early a writer as Medhatithi. But the numerous prose quotations ascribed to Śaṅkha-Likhita do not occur in the printed *Smṛtis* ascribed to Śaṅkha-Likhita. There is another point which is worth noting. Comparatively early writers sometimes ascribe the same text to Śaṅkha-Likhita or simply to Śaṅkha (*vide* Nos. 270-71, 293, 302). Sometimes the passages quoted by the writers are similar, but not quite identical. The well-known sūtra about the inheritance to a sonless man is ascribed to Śaṅkha-Likhita and Paithinasi by Aparārka and to Śaṅkha by Viśvarūpa and the Mitākṣāra. Therefore in the following all quotations whether cited as from Sankha or Śaṅkha-Likhita have been brought together. Quotations from Likhita alone are very few and far between. Even ancient commentators make no distinction between the verses attributed to Śaṅkha (most of which are found in the printed Śaṅkha) and the sūtras of Śaṅkha-Likhita (vide Aparārka, pp. 1149, 1154, 1161, 1165 etc). A few quotations are cited as from Bṛhat or Vrddha Śaṅkha. It is likely that instead of citing the double name, authors briefly cited a quotation as from Śaṅkha. In some of the Mss of Śaṅkha and Likhita *smṛtis* deposited in the Deccan College, the same work is sometimes attributed to Śaṅkha and sometimes to Likhita.

The *Dharmasūtra* of Śaṅkha-Likhita appears to have found a *bhāṣykāra* very early. Laksmidhara in his *Kalpataru* (Ghose's *Hindu Law*, Vol. II.p.504) draws attention to the fact that the *bhāṣykāra* read a well-known *sūtra* as *sa yadyekaḥ syāt* instead of as *sa yadyekaputraḥ syāt* (omitting the word *putra*). Lakṣmīdhara, flourished between AD1100 and 1160 as he was a minister of Govindacandra of Kanauj. The *Vivādaratnākara* of Caṇḍeśvara (AD 1314) twice cites (pp. 234 and 466) the *bhāṣyakāra* of Śaṅkha-Likhita. Hence it follows that a *bhāṣya* on the *Dharmasūtra* was composed before AD 1100 and was available in the beginning of the fourteenth century.

The *Dharmasūtra* of Śaṅkha-Likhita would appear from the text here presented, to have resembled the other extant *sūtras* on *Dharma*. It embraced almost all the topics

treated of in such works as the Gautama or Āpastamba *Dharmasūtra*. It agrees very closely with the *Dharmasūtras* of Gautama and Āpastamba and sometimes has the same sutras as in those works. A few such coincidence have been pointed out in the notes (vide Nos. 35, 36, 39, 62, 133, 135 for Gautama and Nos. 95, 105, 116, 276 for Budhāyana). A quotation from Śaṅkha makes Śaṅkha-Likhita as an authority on *Dharma* (No. 3). The *Dharmasūtra* seems to have approved of *Niyoga*, speaks of the secondary sons, was not favourable (just like Gautama and Āpastamba) to the claims of females to succeed to males. On certain points the *Dharmasūtra* of Śaṅkha-Likhita shows a more advanced state of opinion than is the case with Gautama, Apastamba and Baudhayana. For example, Śaṅkha enumerates several kinds of ordeals, while the above-named sūtrakaras are silent on that point. Sankha enumerates no less than twenty authorities on *Dharma* (including himself). As regards partition, inheritance and succession Śaṅkha-Likhita gives more detailed and definite information than Āpastamba or Baudhayna. It is further to be noted that in Śaṅkha-Likhita the limits of Aryavarta (No. 7) are more extensive towards the east and west than is the case with Baudhayana (I.1.25) or Vasistha. (I.8-9). The style of the work of Śaṅkha-Likhita resembles that of Kautilya more than that of Gautama and Āpastamba (*vide* Nos. 243-245). The quotations hardly exhibit any ungrammatical forms. One quotation includes Yājñavalkya among the writers on *Dharmasastra*. If it is the extant *Yājñavalkya-Smṛti* that is meant, the *Dharmasūtra* will have to be assigned to a late date. But this does not seem to be likely. From the fact that the *Yājñavalkya-Smṛti* itself cites Sankha-Likhita among ancient authorities, from the general style of the work and from its doctrines about the rights of women and other matters, it appears almost certain that the *Dharmasūtra* of Sankha-Likhita is much earlier than the extant *Yājñavalkyasmṛti* though it is certainly later than Gautama and Apastamba. There is close correspondence between Sankha-Likhita and *Yājñavalkyasmṛti* in several cases (*vide* Nos. 14, 27, 69). It would not be far from the truth if the *Dharmasūtra* of Śaṅkha-Likhita be placed somewhere between, 300 BC to AD 100. The prose quotations from Śaṅkha-Likhita refer to the *Vedāngas, Sānkhya, Yoga, Dharmaśāstra* (No. 199). Śaṅkha-Likhita recognised eight forms of marriage (Nos. 66-68). The views of Śaṅkha-Likhita about the status of the offspring of mixed marriages dıtter from those of Budhāyana and Manu and are intermediate between the latter two (No. 75). The Tarpana (No. 110) which resembles that in *Baudhāyana-dhanasūtra*, refers to the six *Vedāngasm* to Bhārata (but not *Mahābhārata*), to twenty writers on *Dharmaśāstra*, and contains numerous details about geography, mythology and cosmogony which are generally found in the *Purāṇas*. The *Dharmasūtra* refers to the opinions of others in the words *eke* (Nos. 358, 363). It mentions by name the views of Yama (182, 223, both in verse). Kātyāyana (No. 207), Prajāpati (No. 278). Angirasa and Uśanas (No. 289), Pracetasa (290), Vrdhagautama (No. 377), Śaṅkha himself (432). It is better, however, to leave out of account the verse quotations in drawing chronological conclusions. The same verses are ascribed to Manu and Śaṅkha (Nos. 33, 38, 148) and some of the sutras closely resemble *Manu-Smṛti* (vide No. 72). Six verses occur both in the *Vāsistha-Dharmasūtra* and also in the versified Śaṅkha (No. 105). Probably both works borrow them from another source. Same passages are ascribed to several other writers source. Same passages are ascribed

to several other writers alongwith Śaṅkha (e.g., No. 293). The idea seems to be that all those exhibited the verse or passage or held identical views.

In the footnotes an attempt has been made to point out the earliest sources from which the *sūtras* are collected. In only a few cases have parallel passages from other works been cited, as it was thought undesirable to encumber the notes. In my forthcoming work on the history of *Dharmaśāstra*, I hope to utilise the materials collected here for further research.

Showing a big bull : A Piece of Hypocrisy in the mitākṣara ?

There is no doubt but that Vijñāneśvara's *Mitākṣarā*, or to give it its correct name, *Ṛju-Mitākṣarā*, stands at the pinnacle of indigenous Indian law-books. Its prestige remains even in the current version of Hindu law which governs the management and enjoyment of joint-family property. Through the centuries since its composition (c. 1125) it has enjoyed respect throughout India, mainly because in its explanation of the meaning of the stanzas of the *Yājñavalkya-smṛti* it has managed to state, in a small compass, all that matters of the *Dharmaśāstra*. It is interesting to find any inadequacies in it, and now we shall consider the translation of an intriguing short passage, in which the author seems to have fallen into hypocrisy—a very rare quality in Hindu legal literature. Fantasy, a formal regard for propositions which no longer held the attention of the public (if ever they held any substantial section of it), and perhaps even a refusal to recognise the challenge of custom and the need to expand the *śāstra* to accommodate long-tried practical institutions : these accusations could conceivably be made against the jurists. But this present writer has not seen a straightforward piece of hypocrisy before; and that is why he is interested in this item.

Yājñavalkya says at I, 109 :

mahokṣam vā mahājam vā śrotriyāyopakalpayet
satkriyānvāsanaṃ svādu bhojanaṃ sūnṛtaṃ vacaḥ.

"Let him make available to a Srotriya a large ox or a large goat, kindly treatment, precedence, sweet food, and courteous speech."

Now it is obvious that Yājñavalkya intends these items to be given to a Śrotriya, namely a Brāhmaṇa of especial devotion to the Vedic lore, and not to every Brāhmaṇa guest. In the previous verse he has been speaking of feeding friends, relatives and kinsmen. In the following verse he speaks of giving *argha*, ceremonial welcome, to the *snātaka*, preceptor, the king, the friend (? and) the son-in-law, as well as the priest at the time of a sacrifice. The large ox or the large goat are reserved for the Śrotriya. As we shall see, this was not always so. But let us pass to Vijñānesvara's commentary on the passage.

mahāntam ukṣānaṃ dhaureyaṃ mahājaṃ vā śrotriyāyokta-lakṣaṇā-yopakalpayet bhavad-artham ayam asmābhiḥ parikalpita iti tat priyartham na tu dānāya vyāpādanāya vā. yathā sarvam etad bhavadiyam iti. prati-srotriyam ukṣāsambhavāt, "asvargyam loka-vidviṣṭaṃ dharmyam apy ācaren na tu" iti niṣedhāc ca.' "He should make available to a Śrotriya who has the above-mentioned qualities a great ox, that is to say a draught-ox, or a large goat, with the words "we have chosen (or 'got ready') this one for your sake", in order to give the guest pleasure but not as a gift to him nor in order that it should be slaughtered. Just as when one says, 'all this is yours'. The reason is twofold : there are not enough oxen for every Śrotriya to be given one, and there is a prohibition expressed in the words. "But he should not practise what is repugnant to Heaven and detested by the public, though it may be consistent with *dharma.*"

What on earth is the point of "making available" the animal if the Śrotriya guest is neither to have the option to take it or eat it ? Let us see how other commentators have taken the verse of Yājñavalkya. Viśvarūpa (I, 108) says *upakalpana-vacanāt tad-anujñāpekṣo mahokṣādi-vadhaḥ.* This is a text which Vijnanesvara had in front of him, and on which he was improving. It is a correct statement of the Vedic *dharma* on the subject : "The word *upakalpayet* indicates that slaughter of the great ox, etc., takes place only if he permits it". In other words, it is up to the guest to decide whether or not to ask for the animal to be slaughtered. Originally it is evident that an ox or a cow used to be offered to special guests who arrived for ceremonial reception. The king, a Śrotriya, and especially a Brāhmaṇa son-in-law, were entitled to elaborate ceremonial reception, at which many offerings, including sweet speech, were made to them, and then the host announces the animal, "The Cow." The guest has the option to say "Do it (i.e. slaughter it)", or to take pity on the animal and order it to eat grass (i.e. as nominal owner he relinquishes the animal back to his host, saving its life).1 Originally the slaughtering of the animal was supposed to be a service to the guest in that it atoned for his sins. This also was part of the hospitality, and the somewhat tough meat which would then be served up to the guest as his meal would be another aspect of hospitality. Thus to say, as Viśvarūpa does, that the animal is not slaughtered unless the guest required it, is correct. Why should Vijñāneśvara differ from this ? If the guest had conscientious scruples—as some guests obviously had in very early times, not less than a thousand years before—it was up to him to pursue them and to save the animal's life, naturally to the relief of his hosts upon whom, in a sense, he was already imposing by visiting them in this ceremonious manner.

Let us see what post-*Mitākṣarā* commentators have to say on the same verse. Śolapani takes a point of view somewhat similar to that of Vijñāneśvara, though he does not express it so elegantly. upakalpayet *vyāpādayet mārayet. Vasiṣṭhaḥ* (IV. 8) : *" api Brāhmaṇāya rājanyāya vā mahokṣaṃ mahājaṃ vā pacet. evam asyātithyaṃ kurvanti", etad go-vadhenātithyaṃ na Kalau. yathā Brahma-purānaṃ — "dirgha-kalam brahmacaryam dhāranaṃ kamandaloh, gotran matrsapindad va vivaho go-vadhas tathā. narāśvamedhau palyaṃ ca Kalau varjyā dvijātibhiḥ."*

Now there is no doubt but that the Kalivarjya theory would prohibit the slaughter of cows. This however does not affect the duty to offer a large goat. And Śūlapāni leaves

us with the impression that the text of Yājñavalkya enloins upon the host to slaughter a large goat ("cow" including "ox") in order to feed his guest. Indeed slaughtering would be to no purpose if the guest were not to be fed with its meat. Thus, apart from the Kalivarjya theory, which emerged some time between the days of Visvarupa and, it would seem, those of Vijñāneśvara himself, the law would allow or require the host to slaughter the animal. Śulapāṇi does not refer to the guest's option. By the way, we may notice that the 13th-century jurist Devaṇṇa-bhaṭṭa ignores the verse of Yājñavalkya when discussing the duties of hosts to guests in his *Āhnika-kāṇḍa*.

The *Viramitrodaya,* which belongs to the seventeenth century, commenting on the verse itself, is clear that *upakalpayet* means "one should cook", and he cites in support a śruti which coincides with Vasiṣṭha as quoted by śūlapāṇi. Thus the northern Indian agrees with the Bengali. A somewhat similar position is taken by Aparарka (twelth century), who belonged to the Konkan area. He says *mahāntam ukṣāṇaṃ balivardam, tadalābhe ajam, śrotriyāya madhuparkārhāya gṛham āgatāya upakalpayet pacet saṃskuryād iti yāvat*. Preferably an ox, or if that is not available, a goat, is to be slaughtered and prepared for the guest's entertainment. *Śruti* is cited, in a more extended form than in the *Viramitrodaya* : for the *Śrotriya* or the king a large ox or a large goat must be cooked. He also cites a long text from the *Bahvṛca-brāhmaṇa* which refers to hosts entertaining with an ox. He continues: "Someone had said that 'he should make available to a Śrotriya' means only offer it to him verbally, but should not injure the animal : but this is repugnant to the Veda. Nor does the prohibition, 'he should not injure all creatures', stand in the way of injury to animais who are ancillary to the *madhuparka* offering any more than in the case of the animal sacrificed to Agni and Soma." He proceeds to quote Manu 5.41 which permits injury to animals in sacrificial contexts and in the *madhuparka* (which is our context). He then quotes the words of Śaunaka in a lost *grhya-sūtra* which recapitulate the Vedic position, in which the guest has the option to ask the animal to be slaughtered (in view of his own atonement) or to have it released (i.e. save its life). In fact the *madhuparka* starts, saya Aparārka, with the making available of the great ox. And so, he implies at this point, the *Mitākṣara's* actual solution is unacceptable.

There is no reason for supposing that Aparārka actually knew the *Mitākṣara* on this point, but he certainly knew its solution to the problem. The real objection to slaughtering the ox or goat was really that the public were not disposed to allow animal slaughter for hospitality, even if they were disposed to allow it for sacrificial purposes properly so called. The development of a doctrine of total *ahiṃsā* was, we know, slow in coming. The objections to slaughtering a cow may have led, but the antipathy to animal-slaughter was much broader-based.

Today there is no trace of a guest's being offered an ox or a goat, and the present writer has never heard of the guest being given the option of asking for it to be slaughtered or to be "released." The most recent commentary on Yājñavalkya is probably that by Bālam-bhaṭṭa on the *Mitākṣarā*, a commentary to be dated at the very end of the eighteenth century. We find that the *Mitākṣarā* solution is fully accepted. The text of

Vasistha is first cited, and then the Kalivarjya point is raised. A Śrotriya is explained as either a Brāhmana or a king. And the form of "making available" appears in the formula which the *Mitākṣarā* has provided. The words are said only to please the guest (one wonders how ?), because that is the natural intention of the formula (it could have no other object). He continues : "*But not as a gift*..........The order of dealing with the topic has aroused some expectation, and therefore he says this in order to remove the possibility that the action should totally lapse (*asya adṛṣṭa-caratva-nirāsāya āha*). Just as when.....Now he begins his explanation. *There are not enough oxen*...........he means there is not one ox to each Śrotriya. Secondly, he cites this : *He should not practise*.......Because injury has been prohibited in general terms that option has become improper and the ceremony tends to be neglected if this is the footing. But merely because Vasistha's rule is barred in the Kali age we should not suspect that the injuries enjoined by the Veda are all on a par; so that there is no public opposition to them (all) : that is the point." Since on this footing the guest will get small pleasure from the ritual, the other acts of service are prescribed by the author in order to make the hospitality genuine.

The position seems to have been this. In very ancient times the arrival of guests having a very special claim to hospitality such as the king, or a son-in-law at the time of marriage, or a learned Brahmana, was an excuse for conspicuous consumption. An esoteric reason for the acts of hospitality had to be alleged and the symbolic value of animal-slaughter at that time was found out. Later, respect for cows still able to provide milk or otherwise contribute to sacrifices led to doubts as to whether such cows ought to be slaughtered even for so great a purpose as hospitality, and bulls came within this doubt also. It was left to the conscience of the guest whether or not the animal should be slaughtered. At first, no doubt, the largest valuable animal was used. Later, due to the poverty of hosts, or the frequency of guests, or the dislike of cow-slaughter, or a combination of any of these, a goat was substituted. And it is at this stage that we have the *sruti* about the "large ox or large goat" and the text of Vasistha which virtually copies it. Now as a *ritual*, which hospitality was and to some extent still is, the Vedic and *sastric* requirements would take precedence over individual convenience and preference, and general moral notions would tend to flow around it as around an island. The right to give such hospitality and the right to take it when offered would long survive the public's doubt whether animal slaughter should take place at all. And the public would have greater doubts on this subject in the Central and Southern regions of India, where meat-eating could safely vanish from the habits of the non-manual working classes. At this point we may look to the Buddhist law on the subject, which seems to fit into Northern Indian attitudes at a time when the laws of hospitality survived in full vigour and the virtue of abstaining from taking life was already widespread, so that two portions of ethics, the one backed by the literate culture and the other backed by popular religion or superstition were in direct confrontation.

The story of Siha, which is well known, shows how the Buddha was looked to as an authority (a virtual legislator) in such a controversy. Where the host has slaughtered

cattle for a feast the Buddhist monk may well eat the meat, without conscientious scruples, but he may not eat meat which has been slaughtered for him. Siha killed a large ox to provide meat for the Buddha and his monks and the food was accepted. The rule that was formulated was that no monk should eat flesh where he has reason to believe that the animal had been specially killed for him. In order to emulate the Buddhists the Hindus would have to deny the possibility that the guest should say "Do it (slaughter it)", and therefore they would have to deny the guest the opportunity of exercising his ancient option. The only way in which this could be done would be to interpret Yajnavalkya and Vasistha in a different sense. If one accepted the Kali-varjya doctrine (and this by the twelfth century was becoming common), it followed that *dharma* allowed a large ox or a large goat to be *offered* to a guest (provided he was suitably qualified), but the dharmic position, according to which the guest might order the animal to be slaughtered and eat its meat, would be counteracted by the popular antipathy to animal-slaugthter. Two paths might be followed. Either the jurist might take the view that *madhuparka* is Vedic, rare, ceremonial, sacrificial, and therefore out of the reach of the popular sentiment-which is the view adopted by apararka, Śulapani, and Mitra Misra (in the *Vīramitrodaya*) : or he could contend that the entertaining of guests was specifically within the popular objection (*the Nāradīya-mahāpurāṇa* and other Kali-varjya sources specifically denied the right to offer an animal to a guest in the *madhuparka*), but that the objection did not eliminate the ritual as such. The word *upakalpayet* does not mean slaughter, nor "give", but "make available" (i.e. so that the option might be exercised) and this could be read with the adjacent material so as to mean merely that the animal should be shown as a formality. Once upon a time (he seems to say) out ancestors used to offer a fine animal to especial guests to complete the hospitality, and the guests could, if they widhed, have it slaughtered for their food. Nowadaysthis does not take place, but the animal is shown in order to indicate that the requisite trouble has been taken. If the ox were not shown the inference would be that the host was too poor. Similarly once upon a time hosts were so selfless that they offered their entire household to their guests in affection and *atithi-pūjā*. Nowadays people neither make such offersnor have the impudence to accept them : but the formula "All this is yours" is still employed. It is less hypocrisy than the survival of a courteous usage into a more practical age.

Without accepting the Buddhist position, which would allow the guest to eat meat which had been slaughtered irrespective of his coming, the *śāstrīs* eventually decided to keep the formalities of hospitality whilst depriving the host of his former right to give the guest a meat-meal. It might be argued that at this rate popular prejudice had got the better of Vedic prescription. No, says Bālam-bhatta, almost certainly rightly; by restricting the force of *upakalpayet* and making the showing of the great ox, etc., a mere formality, an offer which cannot be accepted, one is admitting the force of the Kali-varjya rule, or rather of the popular exaggeration of the Vedic (limited) rule against injury to living beings, without at the same time prejudicing the right of sacrificers to sacrifice animals in Vedic sacrifices where these are still observed. Popular repugnance is to be taken into

account in a sphere where it may properly operate. This is one way of reconciling the conflicting forces. It is interesting to see that at the time of Bālam-bhaṭṭa it was still desirable to view popular repugnance as by no means capable of delimiting the validity of Vedic sacrificial prescriptions. Had the *madhuparka* been totally obsolete by that time it is unlikely that this caveat would have been superadded.

We may return to our initial question. Was this a piece of hypocrisy ? Aparārka believed that the offering of the bull or goat was required by the *śāstra* and that a merely formal offering was repugnant to the Veda and so not good law. His near-contemporary Vijnāneśvara believed that a purely formal offering was necessary, the host implying almost in so many words that the animal is not a gift to the guest. This would give no real pleasure to the guest, and was an empty sham. Indeed a bull could be hired out to hosts (if they did not have draught-cattle of their own) for completing this part of the ceremony. The jurists' certainty that this is a draught-ox makes it even clearer that the guest could not possibly think of asking for it to be slaughtered, with the attendant inconvenience and cost to the agriculturalist host-and it is conceivable that these vegetarian Brāhmaṇas may have known that the flesh of a recently-slaughtered draught-ox would hardly be capable of being eaten.

The answer must be not that Vijñāneśvara, whose point of view won, connived at a piece of blatant hypocrisy, emasculating his author's text, but rather that the ancient ceremony was intended to be persevered in its dignified form, notwithstanding that the original intention could not, in respectable society, be followed out to its logical conclusion. The first argument, namely that there would not be enough even for every śrotriya who came, is not so weak as it seems since, although a goat can be substituted, the text of Yājñavalkya implies that one must always be in a position to offer a large ox or a large goat—to offer only a goat must have been detrimental to the host's prestige, which could never have been the object of the verse. Consequently rather than risk that the ceremony should collapse because the sacrificial overones ran headlong into popular prejudice, and so the text might fail to have any kind of relevance, a compromise was adopted as *dharma* which was almost certainly known in some places as a fact (because guests would never dream of asking for the animal to be slaughtered). And thus Vijāneśvara supports his text and gives it a vitality which it might otherwise not have been guaranteed.

The instance is thus not of hypocrisy but of concern for the validity of a text : rather it should operate in an emasculated form, consistently with the growing literature expressing popular superstitious repugnance, than that one should adopt an austere Vedic stance, and insist upon the Veda and noting but the Veda, with all the evil consequences which that would have.

Modern Indian law follows, in some States, popular prejudice against animal sacrifices, and the *loka-virodha* has indeed won. But it is noticeable that this has not yet happened in Northern India or Bengal : and so the pattern of the ancient *śāstra* is (probably unawares) faithfully preserved.

Simantonnayana; As Described in the Grhyasutras

As is only natural the ancient Indian Grhyasutras — the ritual works containing directions for domestic rites and ceremonies — devote much space to the minute description of large numbers of rites which accompany the individual from even before his birth to long after his death, the so-called *samskaras*. According to authorities of the highest rank these rites were to prepare and purify the body in this life and after death; cf. Manu 2, 26 *vaidikaih karmabhih punyair nisekadir dvijanmanam / karyah sarirasamskarah pavanah pretya ceha ca* "with the holy rites, prescribed by the Veda, must the impregnation and other acts be performed for twice-born men, which, purifying it — that is to say : annihilating the impending evil influences —, prepare the body in this life and after death". In translating *samskara*-by "preparation" — or "rite serving to make fit or perfect" — I depart from the usual translations : "sacrament", which, as any Christian term applied to Indian religion, is apt to complicate matters. The verb *samskaroti meaning* "joining together, preparing, forming or arranging according to sacred precept in order to make a person fit or ready", *samskaras* essentially were those rites which were believed to impart fitness to a person enabling him to face the known and unknown angers before him in a new period of his life (2). They are the Indian form of the "transitional rites" studied by the anthropologists, making a man fit to pass safely through the critical moments of life; only with the aid of the divine power roused and invoked by the rites is man able to carry himself beyond the dangerous stage. Birth, naming, initiation, marriage and sometimes also other important affairs occurring between these should not merely be experienced, but must be celebrated. Celebration is needed to ensure contact between Power and life, to induce Power into life, to avert wicked influences and to impart 'strength'. As long as the rite has not been properly performed the individual has not actually entered the next stage of life, or, at least, he cannot be said to be able to do so successfully. Life indeed in no series of bald facts or mere events, but "a stream in which it is always an affair of surmounting the perilous obstacles where power may fail, but where it may also become overwhelmingly strong".

Now the ancient sources disagree with regard to the number of the *samskaras* : whereas, for instance, Manu, 2, 27 ff. enjoins twelve such ceremonies on the twice-born classes, Gautama, who is one of the oldest and most important authorities, places their number at forty, including however the sacrifices. But both of them agree — as might be expected a priori —in attaching much value to the rites preceding and accompanying the birth of a new individual. Without dwelling here upon these and other differences we may confine ourselves to the statement that during pregnancy a woman was, for the sake of the safety of the embryo and a prosperous confinement, to undergo a succession of rites. One of these, the third is Gautama's enumeration — see *Gautama-dharmasastra* 8, 14 —, is the *Simantonnayana* which will be the subject of this article; although the facts as related in those sources which at the time were available were minutely and correctly reported by Hillebrandt in his indispensable handbook of Vedic ritual it would appear

that the interpretation of the rite has neither in this book nor in other publications dealing with the ceremonies before and after birth received the attention necessary to a real comprehension of its character and purpose.

The *simantonnayana* — or "dividing of the hair" is, according to the majority of the Grhyasutras, a rite which must be performed by the husband only during the first pregnancy of his wife. It can be celebrated in the third month or later — on this point there is much difference of opinion in the texts — but there seems to have been a preference for the fourth month. Part of the authorities have it performed after, other before the *pumsavana*. After having bathed the wife, dressed in a new grament — this "newness" accentuating the entrance into a new stage of life, lessening he difficulties of the transition, and stimulating the induction of that power which makes renewal of life possible — "sits down west of the fire, which the householder was to maintain in his dwelling. While she seizes hold of him — a well-known method of effecting a magico-religious contact and transmission of power — he sacrifices. Then he parts her hair from the front backwards with a needle made of *darbha* — a grass of mystic virtues believed to have a protective power —, a cutting of *viratara* wood — which is to influence the sex of the child, the name meaning "a very male" —, a full spindle, and a porcupine's quill. The last-mentioned object, which must be marked with three white spots, seems to be most essential since its use is, in contradistinction to the spindle and the other objects, prescribed in almost all texts. A similar quill is mentioned in the *Tauttiriya-brahmana* (1, 5, 6), apparently as an auspicious object: " He should shave his head with a porcupine's quill with three white spots since in the case of the gods these are auspicious objects, to wit: the three metres, the three *savanas* (Some festivals or sacrificial rites in general), these three worlds". (10) *Kausika sutra* 8, 17 make mention of it in enumerating auspicious objects. After this central part of the ceremony the husband puts round the neck of his wife the branch of an *udumbara* tree (*Ficus glomerata)* — which is widely believed to transmit generative power — with an even number of unripe fruits. Apastamba (G.S. 14, 7) says that the husband should tie a string of barley grains with young shoots on his wife's head. Some authorities enjoin the use of these fruits in the central act, the dividing of the hair. This act, which is repeated thrice or four times, is usually called the unnayana — "raising, i.e. making, in upward direction, a straight line"; sometimes the verb *vi-nayati* "to part" or *vi-uhati* "to move apart, divide" is used instead. Some authorities allow two lute players " to sing the king or whoever is mightier than the king"; Gautama however enjoins brahman women to sit down near the wife and to address her with auspicious words "mother of heroes, mother of living sons, wife of a living husband". The husband also makes her look at a mess of rice, sesame, and ghee which has been purposely prepared, asking her to see in it offspring; eventually she eats it (Gobhila G. S. 2, 7, 9, ff. At the end of the ceremony the performer of the rite must — according to Apastamba 14, 7 — be silent until the stars appear, when he must touch a calf; before speaking profane words be should mutter the sacred formula: *om bhur bhuvah svah.*

These are the main features of this ceremony, but in particulars there is a considerable amount of difference between the authorities about the several details and the order in which they take place. Old brahman women, whose husbands an children are alive, are, moreover, in Asvalayana's Grhyasutra (1, 14, 8) said alsc ɔ be authorities for the ritual acts to be performed in this case. In some respects these points of difference no longer concern details as is usual in the descriptions of the Vedic rituals as given by the different *schools*. Besides, the Indian commentaries— which often give very useful additions to the sutras and not rarely indispensable information on the ritual practice and the signification of the directions contained in them — do not, completely agree with each other with regard to the sense of the rite. Whereas Hillebrandt leaves this point undiscussed, Winternitz, emphasizing the importance of this *samskara*, suggested considering it a magico-religious act undertaken for the sake of the birth of male offspring. Against this opinion, which as far as I am able to see, has never been combated or refuted, the objection may be raised that it is the *pumsavana* — which we know to precede the *simantonnayana* in the majority of the authoritative texts — which is specially intended for attaining that much-desired object. Other tcholars, in the first place Victor Henry, were inclined to assume that the parting of the hair wan the path aloof which the soul of the child could easily enter the body of the expectant mother. A terious drawback to thil view if that the *simantonnayana* is not repeated for succeeding children. Oldenberg and Keith deemed it possible that the parting of the hair must be reckoned as a piece of deception magic, to deceive demons at a time when a woman it certainly exposed to much danger". This interpretation would, however, disconnect this practice from the many other rites in connection with hair-dress for which other explications have been accepted or proposed. Kane in reconsidering all details of the ceremony as related in the Grhyasutras arrived at the conclusion that it must have hern mainly of a social and festive nature intended to keep the pregnant woman in good cheer. He refers to the *Samskarapra-kasa* (p. 172 f.) which quotes some stan-us from an Asvalayana stating that the rite serve the purpose of driving away certain female goblins who thirst for the details of the embryo; the parting of the hair by the husband with the fruits, the quill, the darbha and the tying of the garland round her neck as well as the tinging of the lute players indicate its festive character. These authorities are apparently inclined to regard the parting of the hair mainly as an art of dressing up. Kane himself expresses the view that on account of the great divergence of details one may conjecture that this samskara was not very ancient in the times of the grhyasutras.

The question may therefore lie asked, if this. rite which at first sight may even impresses up as superfluous — are there no other rites at every critical moment of pregnancy? The *garbharaksana* to ensure conception, the *garbharaksana* in the fourth month to prevent miscarriage — cannot have had history of its own.

Let us first pass on to a review of a few other texts which provide us with a considerable different description of the rite. The *Kausika-sutra*, which belonging to the Atharvaveda and exhibiting a character of its own, has in many cases preserved what seem accurate

account of the rites which were accompanied by the texts preserved in that Veda, and which differs from the Grhyasutras in that it has never been greatly influenced by the traditions of the Vedic achools, contains is those portions which deal with domestic ritual also a pericope on a *simantonnayana* (khandika 79). Curiously enough this ceremony is discussed in the last chapter of the section devoted to the many rites and rules for the performance of a legitimate marriage. In this 79th khandika the author sets forth what the newly-married couple after having observed, for three nights, the ritual chastity, are expected and obliged to do. After the period of continence and the consummation of the marriage the young man is to sprinkle the head of his wife, who is given a new garment, with young, sprouting grass, to place rice and barley upon it, and to divide her hair by mean of a bunch of *darlıha;* in so doing he should recite the stanza Alharvaveda 14. 1, 55 which runs as follows: "Brhaspati has first arranged (done) the hairs on the bead Surya; with this, O Asvins, we completely prepare this woman for her husband". Now the fourteenth book of the Atharvaveda contains the wedding-stanzas, i.e. the formulas to be recited in performing the marriage ceremonies; a considerable number of these recur, with many variants, in those chapters of thr Grhyasutras which deal with the ceremonies discussed in this article. Coinciding largely with the Suryasukia of the Rgveda (10, 85) which depicts the wedding of Soma and the daughter of the Sun, Surya, which was considered the "Urbild" or prototype of marriage, the stanzas contained in Albarvaveda 14 refer to that divine first bride who is represented by every earthly bride and whose marriage is re-performed in every marriage which is celebrated in the Aryan community. On that occasion Brhaspati, the house-priest of the gods and prototype of the purohita, was of course the officiating priest. So he must be regarded as the originator of the rite under discussion. The Asvins were the wooers who asked, on behalf of young Soma, for Surya's hand. The verbs occurring in the stanza, *akalpayat* and *sobhaydmasi*, are difficult to translate, the former expressing the idea of "preparing, arranging, filling out, selling ill order" and the latter such connotations as "making ready preparing, adorning, decorating. muking beautiful". Yet I cannot agree with Whitney-L.innian in rendering *sobhuyamasi* by "we adorn". As is often the case the aesthetic element contained in the idea expressed by this verb is of secondary importance. But this point need not cetain us here. What matters is that the woman is described as being prepared for her husband got for her child; pregnancy and childbirth are altogether out of the question. According in one of the *paddhatis* — a kind of guide-book or manual for particular rites and the irxts relating to them —, the next stanza (Atharvaveda 14, 1, 56) is used together with the above verse 55 for the same purpose. Though obscure in some respects it furnishes us with the interesting information that a this is that form in which the young woman dressed herself" and ends by asking who was the one who knowing — i.e. possessed of knowledge which leads to special or even supranormal achievements—, unloosened these fetters (*vicarcarta pasan*). The occourrence of this verb is worth noticing, because it is also used in the description of the rite in the Kausika-sutra.

There are indeed four points in that text which immediately spring to our attention.

First, the terminology adopted by its author is not identical with that used in the Grhyasutras: whereas these have, in nine cases *unnayati* and sometimes, as already related, *vinayati* or *vyuhati.* Kausika prefers *simantam vicrtati* which literally means: "he loosens, detaches, unties, opens the parting of the hair. This may of course be rendered by "he parts the hair by loosening" — but what it it that is loosened? It is interesting to quote Ihe commentaries on this passage: according to die commentary called *basa karmani brahmavedoktani* the phrase *simantam vicrtati* means *kamcukam murdhni dadhati;* identifying *kamcukam*with *kamcukam* a dress fitting close to the upper part of the body" we must take these words to mean: "he (the young husband) places such a dress on her head", *id est:* he envelops her head in a sort of hood. Another commentary, the *Atharvaniyapaddhati),* in saying that "he places an awning on her head *khamdakam murdhni dad!uati)* may be supposed to refer to the sainn or a similar article of dress. The second point of difference concerns the utensils needed in performing the ceremony proper: the porcupine's quill, which is mentioned in all Grhyasutras and which may therefore be regarded as the characteristic element in the renuisites for the rite, is missing here. The third respect in which Kausika diverges concerns the description itself; no preparatory acts or introductory rites are mentioned, no other ceremonies seem to have combined with the central act. The last and most important point has already been referred to: the parting of the hair in Kausika does not belong to the rites to be celebrated during pregnancy; it forms part of the so-called *caturthikarman-,* the ceremonies performed on the fourth day of a marriage, in connection with its physical completion. The commentaries on Kausika's sutra explicitly affirm that the *simanta* is the coturthi or *reiturthtkakarman-*. The "ritual of the fourth day " as described in the Grhyasutras. however, comprises offering of cooked food presented to eight gods, the pounding of an *adhyanila* root, part of which is sprinkled into the wife's nostril and other acts, but no dividing of the hair. There is one sutra which makes mention of hair; the young couple have their hair and nails cut (*napitakarman-* "the barber's rite" on the fifth day) and then go out of the village to pay — for obvious reasons — honour to an *udumbara* tree and to pray for good fortune on their marriage *(Baudhayana-grhyasutra* 1. 8), but this custom has obviously nothing to do with simanta. Victor Henry, who at the time devoted some pages to the ceremony under consideration, apparently ascribed these important divergences in Kausika — which does not mention here the rites of the *caturhikarman at* the other works describe it— to the peculiar character of this work : "Le Kaucika-Sutra, n'etani pas. a proprement parlor, un manuel du culte domestique, n'a point affaire du *simanlakarma*". Although this argument is in itself of a rertain value, I for one cannot despatch the matter so easily.

This, however, is not all. In another chapter of the *Kausika-sutra,* dealing with the *strikarmani,* i.e. the mag!co-religious acts related to women and in Darila'i commentary on this pericope we find the following direction: « to the text Atharvaveda 8, 6 belong the following ritual acts: 'one shou.ld attach the two objects mentioned in the text (to wit a while and a yellow mustard-seed), wrapped up and kept in the aforesaid manner, and with the dregs of the libations which are consecrated with the tame text, to the neck of one's wife when she is with child. In so doing one scared away a great number of demons

which aim at the life and the health of the woman; these demons, part of whom are not known from other texts, are enumerated in the above Atharvavedic text. The *paddhati* of Keiava and the commentary on the Atharvaveda supply us with additional information: the rite mentioned by Kausika is the *simantonnayana*, starting that this rite is to be performed in the eighth month of a woman's pregnancy; the tame authors and the commentator Darila say that the mustard-seed constitute an amulet and thr *Atharva-paddhati* seem to prescribe "an amulet in the form of a doll made of red and yellow mustard" and reaching from the woman's neck to her navel. In his important translation of a great portion of this sutra Caland, disagreeing with Kesava and Sayana, characterized the rite as serving the purpose of protecting the pregnant women. And so did Henry: "...mais ses commentateurs connaissent le nom et l'usage (du *simantakarma*), et c'est a ce sacrement, a tort ou a raison, qui'ils rapportent la remise d'une amulette... accompagnee d'une des diableries les plus caracterises que jamais certainment ait produktes aucune literature fantastique."

Let us now cast a glance at another sutra which though containing the *simanta*-rite disagrees with the great majority of texts. In the 15th chapter of the first part of the *Manava-grhyasutra* it reads: Having taken in the third, sixth or eighth month of the pregnancy, the two pieces of wood used for kindling fire, having made oblations with the Java-formulas, etc., and having loosened all the hair of the woman, who is sitting to the west of the fire upon *darhha-grass*, and having anointed it with fresh butter, he (i.e. the husband) parts her hair wilh a porcupine't quill with three white spots and a *sami* branch with the leaves on it, whilst reciting the stanza: "Agni has given back the wife etc." This verse, which it- worth quoting in full, is Atharvaveda 14, 2. 2: "Agni has given hack the wife with long life and splendour; he who is her husband, may he live a long life-time, a hundred antumns. " Two other Grhyasutas, Kathaka (31, 2) and Varaha (16. 9), have it also in their chapters on the alteration of the hair-dress, the latter using it, like Manava G. S., in the act proper to an to exclude other formula. The reference to the god Agni becomes clear if we remember that he belonged to the divinities — Soma, gandharvas. Agni— who were supposed to have first claim on a girl before her being married to a human husband. This detail would, however, suit a wedding-stanza-better than a formula to be recited in the circumetances mentioned in the above Manava passage. So does the tenor of the stanza in general: it hints at the fear of the serious dangers impending for the first owner of a woman; only when the beings who up to marriage have possessed the gid give her back" voluntarily, a human husband may make himself easy about that. Accordingly the tame Manavasutra prescribes its use among the stanzas accompanying the offering of grain which form part of the wedding ceremonien (1, 11. 12).

The act proper *is* denoted in Manava by the phrase *simantam karoti*, a term peculiar to this text, since it also appears in 1, 12, 2 in the nominal form *simantakarana*-. For, what if men interesting. Manava is the only Grhyasutra which gives this ceremony twice: whereas in chapter 15 it follows the *grhapravesa* or entering of the young couple into the house, and precedes a *strikarma* corresponding to the *pumsavana*, it forms in the chapter 12, part of the wedding-ceremonies. A close examination of the context reveals the interesting fact that the *simanta* ceremony, as a part of the marriage solemnities, is performed in the parental

home of the girl. It is the last ritual act to be performed before the young couple departs to the house of the bridegroom. Dresden, in commenting upon Man. G. S. 1, 12, 2, found it strange that this sutra prescribes a *simanta* rite at this point of the marriage-ritual.

Entering into some particulars we may quote the relevant passage (1, 12, 2 ff.) in full: "Then he performs (the act of) the parting of the hair with a porcupine's quill with three white spots, or with a *darbha*-stalk together with the root, with the stanza: Sena by name (broad, winning wealth, embracing all things. Aditi whose skin is as bright as the sun's, Indrani, overpowering, victorious, may she, the lady of prosperity, give prosperity me)". The purport of these words is clear: the bride is identified with Aditi, the mother of the gods, the geat mother, who is also identical with the earth—that manifestation of fecundity par excellence, Aditi is a divinity of width and breadth, which are needed to allow the blessings of heaven to reach this world, needed also to allow the earth to produce food. Sena, like Indrani, is the name of Indra's wife, or of one of his wives; literally meaning "missile" it obviously is an abstraction of his nature: Indra, the god who wields the thunderbolt, represents foce and power in nature, including fertility.

"Then", Minava continues (1, 12, 3), they anoint (the hair of the bride) with the stanza: "Having anointed their hair, being kind, having children, for the sake of honour (*yasias),* having many sons, not being evil, (but) being kind to their husband, their father-in-law... (?), living long, having their mother-in-law, having a long life (?)". This stanza, which seems to be corrupt, has no parallel in other texts. As has already been pointed out on one of the foregoing pages the chances of the bride's exerting an evil influence upon the family of her husband thould be reduced to a minimum. The next stanza, quoted in sutra 4 has no parallel either: "He (?) the subject if not indicated) binds together (her hair) with the wool of a living animal whilst reciting the stanza: "Having bound together your hair which is not deceitful nor terrifying, be kind to all your woman friends; be kind, you who are of good family, now that you are married etc." From this passage it may be inferred that after the parting has been completed the hair is bound together into two parts. There upon they take (?) sour milk and honey or a portion of (food) which is fit for sacrifice". After having said "hail" (*svasti)* and murmured in unison: "United are your wills..." bride and bridegroom should eat together (6 f.). To conclude, the remark may be made that no such precepts are given in thurt directions for the *simania* rile in 1. 15.

In attempting to reconstruct, after this reviw of the relevant facts, a picture of the nature and purpose of the rite, of its original function and relation to other ceremonies and to trace its development in the course of time, the question of sources becomes all-important. Should we, after having started that there is not only a great divergnce among the Grhyasutra about the several details of the *samskara,* but also a difference of view with regard to the moment at which it was to be executed, pronounce a *non-liquet* and follow our predecessors in leaving the matter at that? Should we, in consideration of the agreement among the majority of the sources on this main point that the rite at issue relates to a pregnant woman, conclude that Kausikma and Manava in deviating also in this respect represent a secondary stage of development? Or has the isolated Kausika preserved what

was the original function of the rite? In attempting to make our choice from these possibilities we should be aware that this *samskara* whether it originally belonged to the wedding-rites or to those relating to pregnancy, forms part of a complex of ceremonies which have undergone development, in the course of centuries. Any theory with regard to the original character and primary function of the *simantonnayana* which would be incompatible with the history of the ritual connected with those two important events in feminine life should, a priori, be considered improbable.

In order to arrive at a conclusion it seems to be interesting to note that there doet not appear to have been an ancient and uniform tradition among the individual Grhyasutras with regard to the elements constituting the rite. Attention may be drawn to the following details: The sutra of Asvalayana 1, 14, 3 in alone in enjoining that the young husband after having spread, to the west of the fire, a bull's hide with its neck to the east and the hair outside, causes his wife to sit on it whilst taking hold of his hand; in this position she undergoes the act. Now the bull's hide is, in all Grhyasutras, a well-known utensil, not in a rite relating to pregnancy, but in the chapter on marriage: when the bride and bridegroom arrive at the home of the latter, the bride must enter the house without touching the threshold, and sit down on a similar skin. According to part of our sources a male child is, then, placed in her lap, fruits are put in his hands, and brahmans wish her prosperity; obviously a ceremony for the sake of the birth of male offspring. This purpose, which is also apparent from the formulas recited in executing the act, is expressly recorded in the formulas quoted by Kausika (78, 1) and Apastamba (G. S. 6, 8), who stating that the hide is a screen and a means of protecting the woman (*sarma varma)*, emphasize that the act is to promote fecundity. However, not all schools agree with regard to the moment at which this rite is to take place. The *Vaikhanasasmartasutra*— which, it is true, is late and contains traditions transmitted in the South of India.—whilst omitting the period of continence and the above *caturthikarman-* prescribes instead of it a *caturthivasa* or "staying on the fourth day" in which the red bull's hide is an important element. The acts to be performed and the order in which they succeed each other (Vaikh, 3, 5) leave no doubt as to the identity of this ceremoney with part of that prescribed in the other texts for the day of arrival at the new home. Nay, the text is even explicit in stating that the husband should spread the skin after having entered his house and established the fire — which has served at the celebration of the marriage — in the eastern half of it. Lnstead of a bull's hide the skin of a black antelope may do duty. The husband then causes his wife to sit down, facing the (auspicious) east or north. The boy is left unmentioned, but the Vaikhanasas agree with other schools in enjoining that the young woman and her husband should sit until the stars appear. The conclusion may be that in the traditions of this school the hide ceremony after entering the bridegroom's house and the *caturthikarman* have coalesced: there is, generally (peaking, a great divergence in the details of the preliminary and subsequent riles relating to marriage.

Of a more complex nature is the tradition of the Manavas in regard to this. Whereas the direction to spread the skin is, on the one hand, given in chapter 1, 14 which deals with the *grhapraresa-*, "the entering of the house" and the ceremonies subsequent to that event

(1, 14, 7) — and here it is no little boy but a brahmacarin (a young student who observes chastity) that is placed in the lap of the woman —, the same ceremony aim occurs at an earlier moment. Immediately after the *saptapadi* — the most important element in the long series of marriage ceremonies: the seven steps taken together by the young couple — the bride is ordered to sit on the skin, which (an in 1, 14. 7) has been bestrewn with *darbha*-grass. The rope with which she was, at an earlier moment, girded is now loosened, then fastened again to be untied for the second time in the new home before the consummation. This repetition, which is not mentioned in any other text, like the "redoublings" of the rite with the skin it a striking parallel of the twofold occurrence of the *simanta* episode in the same Manava sutra. It also reminds us of another redoubling, to wit that in Asvalayana who has the hide in the *simanta* and in the *grhapravesa* sections.

Concerning the use of a skin, the comparative study of religions and folk-lore has brought to light many data of interest. It was, among various peoples of Europe and parts of the world, a customary practice to cause the bride to sit down on the hairy tide of an animal's skin. Wool is, widely considered a 'sacred' substance, strings made of it are used protectives, and the animal's skin to which it belongs shares in this character. The stanza AV. 14, 2, 21 which is used (Kaus. 78, 1; (f. Apast. G. S. 6, 8) is the Inian skin-episide is quite explicit: take this protection, defence, to spread under this woman". Why the skin belonged to the hull, in whom the seed of procreation, is evident: hence AV. 14. 2, 21 etc.: let her have progeny ". It may therefore be considered an established fact that a skin-rite formed part of the 'original', or rather of the common prehistoric Indo-European wedding ceremonies: it is for instance found in Russia and other parts of the Slavonic world. According to Feslus. s.v. and Platarctius, Quaest. Rom. 31 the Roman bride (at dmrn on a *pellis lanata* or vdxo; As regards ancient India there is an unmistakable allusion to this custom in a mantra belonging to the wedding stanzas of the Atharvaveda : 14, 2, 24 *"a roha carmopa sidagnim esa devo hanri roksamsi sarva / iha prajam janaya patya asmai sujyaisthyo bhavat putras to esah* a sit down on the hide; sit by the fire; this god (Fire) slays all the demons; here give birth to progeny for this husband; be this son of yours of good primogeniture. So it may be taken for granted that this rite, also in ancient India, originally belonged to marriage proper, not to the formances relating to pregnancy. We are fortified in this conviction by the consideration that a hide is also a utensil of frequent use in initiation rites. As the ceremonies performed for girls during, or immediately after, marriage, often run parallel to those performed for young men on the occasion of their maturity, the curious alternative in the Vaikhanasa text — a hide of a bull or an antelope — is worthy of our attention: the wearing of the skin of a black antelope was a practice especially enjoined on a brahman student. As it is natural to see in it some special connection with the power to be derived from this object — its ritual use is well known: it was believed to convey the divine essence which it contains viz. the *brahman* unto the person who wore it or who stood on it — the hide of the bull was of course a means of transmitting 'fecundity' to the bride. So the conclusion may be that the skin-episode prescribed by Asvalayna for the *simnionnoyana* reminds us of the ancient wedding ceremonies. This conclusion is corroborated by the words of the text itself: in describing this skin-episode Asvalayana simply repeats the relative pericope of

the description of the wedding ritual (1, 8, 9).

There are other similarities suggesting a connection between the parting of the hair and marriage. At already pointed out by Weber the direction is given in some of our sources that the woman before undergoing the hair-dress rite is to put on a new garment. Kausika 79, 13 states that this act must be accompanied by the recitation of the two usual , clothing-stanzas", to wit Aharvaveda 14. 145 and 53. From the contents of these verses it may be inferred that this act was to secure such highly valued benefits as old age, 'beauty' and progeny.

Although this direction is perfectly intelligible, since the simanta rite follows, in Kausika, immediately after the consummation, and the bridal chemise is, partly for magical reasons. taken away, it is difficult to see why the new dress should have been prescribed in Sankhayana's sutra (1, 22) for the *simaniomnayana* which is to take place in the seventh month of the first pregnancy. But here we encounter another duplication: a similar prescription was already given by Kausika in chapter 76, 4 in connection with the important ceremony of the bride's bath (75, 26). At this moment the injunction is, however, also known to other texts.

Another feature of interest is the injunction found in Kausika 76, 5. On the occasion of the ritual bathing, the hair of the bride is combed, whereas an alteration in the hair-dress it prescribed in the other texts only in connection with the *simantonnyana*. In the other sources any qualification of a comb to be used is omitted, but Kausika has the rite performed with a romb of a hundred teeth. Now a comb may not only be used to remove tangles, dirt, and vermin from the hair, but also to purify it from dangerous influences of any sort. "Das vielfach vorgenommene rituelle Kammen der Braut soll wohl alle ihr anhaflende 'Unreinheit' von ihr entference."

An examination of the above Sankhayana passage 1, 22 dealing with the simantonnayana leads us to another conclusion on this subject. The words of the text: "he causes her, who has bathed and put on a new dress, to sit down west of the fire and sacrifices whilst she takes hold of him, pronouncing the *mahavyahrtis* (i.e. mystical formula *bhur bhuvah svah*); (then) the dish of barley boiled in milk cooked..." are very similar to those used in enumerating the elements of the Indranikarman or preparative bathing: "after having caused the girl lo be washed and after having dressed her in a red or new garment he makes her sit down to the west of the fire etc. " The dish *(sthalipaka-)* is however not prepared after these arts, but at a later moment, during the *caturthikarman* (1, 18) and, again, during the *garbharaksana* ceremony (1, 21) which must prevent miscarriage.

As pointed out by Winterniti (75) the preparative bathing forms, in Apastamba's sutra, a unity willi kome other rites (4, 8). Bathing and putting on a new garment are on the other hand absent in his description of the *simantonnayana*. But the latter — with the exception of the beginning and, of course of the parting of the hair — largely coincides with the elaborated passage (Ap. 8. 10) devoted to the *caturthiharman*. which we know to lielong to the ceremonies of marriage. The same ritual acts serve, moreover, also on other occasions: if the wedding-cortege in proceeding to the house of the newly-married pair passes a

place for burning dead bodies (6, 4); in that new house after the bull's hide ceremony (6, 10); and in addition to these cases which, again, relate to the celebration of the marriage proper, in a magical love rite for the purpose of deepening (be mulual affection of the couple.

Some words must be said here on the lute players, singing according to Asv. 1, 14. 6 f.; Baudh. 1. 10. 9, ft.; Sankh. 1. 22. 11 and other sources, at the request of the young husband. Those Grhyasutras which join the Maitrayani- and the Kathaka Samhitas of the Black Yajurveda and the sutras of the Samaveda omit both the musicians and the mantras sung by them. One of these texts, Manav 1. 10. 7, however inserts a similar injunction: "make the sound of lutes resound" after the yoke-hole rite, which forms part of the marriage ceremonies. The sound of music is auspicious: "when a man attains to sri- (well-being, prosperity, distinction), the lute is played to him...; the lute is a form of *sri-*; it is *sri-* they confer upon him " (Salapatha-br. 13, 1, 5. 1). According to Sudarsana. on Apast. G. S. 2. 14, the sound of conchs, drums, lutes, flutes etc. and the songs of women of good family form part of the *mangalani*, the auspicious and luck-bringing acts, ordered by Apastamba at the wedding ceremonies. Music drives away magical evil; it may even lead to *moksa-* "final emancipation the so-called Nejamesa stanzas which, in Asvalayana's sutra, occupy the next place. Reserving this point to another article we only state here that these stanzas. Rgvedakhilani 10. 184 1-3, contain, without any doubt, a magical 'prayer' to obtain a son: "Nejamesa, fly away, and come speedily back with an excellent son. Make me, who longs for a son pregnant with a male child. etc." As was already observed by Winternitz, the explanation of the chararter of Nejamesa propored in the Petrograd Dictionary cannot be correct: in the mantras and the grhyasutras Nejamesa is no drmoniar enemy of children, but a divine being able to grant off-spring and implored to do so. Medical texts which consider him an evil spirit causing death and illness to children do not ignore the possibility of making him favourable. He is even invoked to protect children. As gods and spirit who are believed to do harm are also considered to be able to interrupt their wicked activities and to annual the injury they have done—the Mahabharata states that deities of this class are revered by people who desire offspring because of their power over children (3, 228. 5 f.) —, as. moreover. Nejamesa is a goat-faced god, that is to say :belongs to a category of beings which it, elsewhere regarded as the good genii of children and protectors of procreation —, the use of the Nejamesa stanzas in the *simanionnayana* points in the same direction: the rite, at least in the forms presented in these texts, is to obtain male offspring. There is other evidence of this. The same stanzas also belong to the so-called 'rite of the six oblations' (*sadahutam*) occurring in Manava-grhyasutra 2, 18 and in Kathaska-grhyasutra 48. A man who longs for sons should, on each first day of a lunar fortnight, cook a *sthalpaka* and offer therefrom whilst pronouncing twelve stanzas. These twelve offering produce pregnancy. Afterwards, that is to say, the commentary informs us, when after a year no son has been born to him, he cooks another *sthalpaka* for Nejamesa and pronounces the above verses. Now the first seven stanzas of the former series—the first of which runs as follows: "Let Agni, the destroyer of demons, joining Brahma, dispel the diesease-demon from here who, having an ominous name, rests on your child and your womb." are

obviously itended for the annihilation of those demons who wish to kill an embryo and to prevent procreation. The greater part of them reappear in Rgveda 10, 162 and this sukta is, in the Brhaddevata (8, 66), significantly called a consecrating prayer for children issuing from the womb (before the right time). Similarly, Sayans has the text recited in order to protect the embryo and to prevent miscarriage. The Rigvidhana, 4, 17, 1 ff. prescribes its use in aceremony for giving birth to a living child. For a similar purpose, protection of the embryo, Sankhayana's Grhyasutra 1, 21 hs sacrifice celebrated consisting of six oblations; the formulas to be recited on this occasions are RV 10, 162 and in addition to this, 163. The last five stanzas quoted in Manava 2, 18, 2 are to bring about conception and birth. Dr. Dresden is no doubt perfectly right in characterizing the second part of Man GS. 2, 18, to wit the Nejamesa ceremony, as a reinformcement of the *sadahuta*, if no success has been attained by this rite. So there can be no doubt whatever with regard to the function of these verses.

It is however, interesting to note that these Nejamesa stanzas, together with ten other verses, occur also in the *Apastambiya-man trapatha* 1, 12, 7; 4; 6. They are, according to Apast, GS, 8, 12 ff.. to be recited during a ceremony which has only an indirect connection with marriage proper which is the subject of the preceding sutras. The rite referred to in 8, 13 is not the *caturthikarman*, which has been dealt with in 8, 10, but another one, the so-called *rtusamavesana* which is intended to make the obligatory cohabitation on the fourth day after the menses successful. The thirteen stanzas are therefore, in addition to the physical act, a means of securing pregnancy: The stanzas are perfectly appropriate to the rite: they are: RV 10, 184 (cf. AV. 5, 25, 2-4): for successful conception; RV khila 10, 184; a verse corresponding to Hir. GS. 1, 25, 1; Sankh. GS 1, 19, 5, of similar purport; four stanzas occurring also in the AV.: 3, 23, 2-5: part of a charm to procure the conception of male offspring (*pumsavana*, Kaus, 35, 3), and some other mantras which are peculiar to the text under discussion.

Although we cannot for reasons of space dwell upon all mantras used in connection with the simantonnayana passing mention should also be made of Baudhayana GS. 1, 10 where Taittiriya-samhita 3, 3, 11, 2; 3 are prescribed: "until the end of the division", *id est* the stanzas g.u. These verses are to accompany the so-called *Devikahavimsi*, obtion" (Yajn, smrti 3, 115 f.). At another moment of the wedding ceremonies (1, 9, 29) Manava has *nandi* songs executed, the term *nandi* being explained in the commentary by a special kind of tune. From these and other passages it may be inferred that at a wedding musical performances were not unusual. As, on the other hand, they are hardly ever prescribed in an unequivocal way on other occasions the occurrence of the lute players in the chapter on the hair-dress ceremony is remarkable, the more so as we are also informed of musical being played after the three nights' period of obligatory chastity.

As regards the formulas to be sung, these seem to have been very important, since the sutras which belong to the Black Yajur Veda, though omitting any reference to the musicians, have the mantras pronounced by the young husband (cf, e.g. Bharavaja, p. 21, 13 ff. S.) There is divergence as to whose praise is to be sung; some texts mentioning, as we have seen, the ruling king or somebody else who is very valiant, others prescribing a song in

honour of Soma, the divine king of vegetation who is invoked to bless the human race; some of the authorities allow that the river on which the young couple dwells is to be invoked. There is room for the supposition that these mantras are to implore the protection of those mighty beling under the sovereignty of whom the couple dwells, and at the same time to enhance the potency of those divinities. According to Hir. 2, 1, 3 the husband should address his wife not only with "Soma is our king", but also with "with you we wish to overcome all hatred (animosities) like streams of water", words prounced also at the end of the rite pertaining to house-building—the husband must mutter this formula whilst looking at his wife (1, 29, 5), and after the *lajahoma-* (offering of parched grain) at the wedding (1,20, 5). The latter application is also found in Apast. G. S. (thrice: 2, 5, 7; 9; 10) and Jaim. G. S. 1, 21. As Hiranyakesin's school admittedly constitutes an offshoot of Apast., the use of this wedding mantra' in the two other rites may be considered to represent a younger particular tradition.

Attention may finally be drawn to Hiranyakesin's Grhyasutra which in dealing with the *simantonnayana* enjoins (2, 1, 3) that the woman be washed, and adorned (i.e. covered with amulets), that she wear clothes that are ritually pure etc. The same words recur among the rules to be observed on the fourth day *(caturthikarman.* 1, 24. 8). A bathing proper at the beginning of the wedding ceremonies is however not prescribed in this sutra.

Let us now turn to the mantras or formulas which in performing the *simanta* rite are to accompany the preliminary acts. The stanza Atharvaveda 7, 17, 2 occurs sometimes in the ritual texts: "Let Dhatar assign to his worshipper all unexhausted further life; may we obtain the favour of the all-bestowing god", or 7, 17, 1 in which the same god is invoked to give wealth. Although it must be granted to Whitney and Lanman that the 'hymn' (AthV. 7, 17) offers little to suggest its being originally intended to procure the birth of a male child, it is, in point of fact, used by Kausika in a rite for that purpose: 35, 16 a if (a man) wishes his wife to give birth to a son he should whilst gazing at her lap. recite Ath. 7, 17 (1-4)". It is the name of the god Dhalar— which introduces each of these tour stanzas— that makes them suitable for this purpose:

"Dhatar", the Establisher does not only give wealth, a long life and "all desirable things" (st. 3), or create sun, moon, heaven and earth, he also "places" *(dha)* the germ of the unborn child. These stanzas point to a certain connection— whether this be ancient or not—between the *simnta* and the *pumsavana* rites, for it is to the latter category that the Kesava passage belongs.

The next mantras worth mentioning are the two *rakaṃ aham* stanzas, i.e. Rgveda 2, 32, 4 and 5. This sukta consists of two parts, the second of which is addressed to Raka, Sinivali and other female godheads (4-8). These verses, which are prescribed by Asvalayana 1, 14, 3, are, in accordance with the character of these divinites —Raka, is an ancient diety of fertility, and Sinivali is as a Zeugungsgenie especially concerned with conception, obviously a prayer to obtain offspring; cf. st. 4 d "she (Raka) must give a hero (son), worth a hundred cows and deserving praise" and 6 d "give us, O goddess (Sinivali) offspring". As moreover these verses are, as AthV. 7, 48, also said to belong to a series of texts relating to husbands,

their function may be regarded s perfectly clear.

It would carry us too far fully to discuss lations made to Anumati, Raka, Sinivali, Khuh and Dhatar. Anumati appears in the Atharva- and Yaurvedas as a goddess who favours love and over propagation. Her name meaning "Favour" (of the divine powers) she is believed or besought to be propitious, to protect man and to grant him a long life. In addition to this she is the goddess of the full moon, the container of the draught life. Kuhu, "the fortune, who is easy to invoke", the other goddess whose name has nsot yet appeared in these pages, is the new moon; as a "lady of immortality" she is likewise implored to assign wealth and fortune. Part of these stanzas are, as Atharvaveda 7, 20, 1-3, prescribed by Kausika (59, 19) on behalf of a man who desires all kinds of benefits.

Finally, the last stanza used by Asvalayana in performing the rite under discussion (Asv. GS. 1, 14, 3) is variously used: the same authority has it again 1, 4, 4 to accompany the offerings to be made at the rites of tonsure, of the reception as a student, of shaving and wedding. The stanza, which is RV 10, 121, 10 and AV. 7, 80, 3, is addressed to Prajapati, the lord of creatures, imploring him for wealth.

In conclusion then, our impression of the mantras used during the preliminary acts is this: they, generally speaking, concern conception and especially conception of a son. They cannot be adduced to substantiate the hypotheses ventured on by Henry and Kane with regard to the meaning and function of *simanta* rite. Although they may be regarded as appropriate if the rite is, with Winternitz, to be considered a sort of *pumsavana*, they are out of place and not adapted to the circumstances in those texts which have the rite performed in the sixth or eighth month of pregnancy.

Turning now to a discussion of the essential rites of the ceremony we must distinguish two momentws: the dividing of the hair, and the putting on of a garland or string of unripe fruits. The former rite is mentioned in all the Grhyasutras, the latter is missing in Asvalayna, Apastamba, Khadira, and Manava. With regard to the dividing of the hair the remarkable fact must be noticed that the rules given for this act in part of our sources—especially in Apastamba—have some resemblance to those pertaining to the *caula-* or *cudakarman;* the ritual first cutting of the hair on the head of a child, to be performed according to many authorities in the third year of its life. Among the materials required in this ceremony are the bunches of grass *(darbha)*, a vessel filled with head leavs, and, according to some authorities quoted by Sankh. 1, 28, also the porcupine's quill; the mother with the boy on her lap is to be seated to the west of the fire.

An interesting custom is related by Sankhayana (GS, 5, 17): if a woman gives birth to has been imparted to her, she should receive it as yet, but now the boy is, as in the *cudakarman*, placed on her lap. From this detail it may be inferred that at least for those who introduced this rite and propagated the theorities connected with it, it was to be performed for the sake of the child.

The second part of the rite is one of those well-known practices serving to protect the woman from evil influences and to impregnate her with the fertilizing power of the fruits, flowers or grains. Necklaces, garlands etc., are to a great extent, amulets or means of

transmitting beneficial power. In the magical rites described by Kausika these and other auspicious or protective objects are tied round the neck of arm, put into the hair, sprinkled (in water) over the head of the woman on behalf of whom the ceremonial is conducted.

Venturing now a theory of my own in order to explain the meaning and origin of the whole ceremony mention may first be made of a remark to be found in Weber's *Indische Studien*: the particular form of the *simanta* rite presented by Kausika contains elements which are well known to those versed in the study of ancient European folklore. A closer examination of all details indeed reveals that there are striking affinities between this Indian rite of hair-parting and several elements of the ancient Indo-European marriage-rites. Ritual acts connected with the hair of the bride are very common. They beong to wide spread customs and beliefs: at births, deaths, and marriages, being the most important transitions, the hair of those concerned—e.g. the surviving relations— is often shorn; after a journey, illness, or another critical period it is also not rarely cut off. The brief statement may suffice here that various ancient Indo-European communities were among those who either shaved their heads or changed their hair-dress on entering upon a new stage of life or a new social position. Enslavement, and, for a woman, marriage often meant the loss of long and wavy hair. The Greek and Anglo-Saxon brides offered parts of their hair. In Rome this custom survived as far as the Vestal virgins were concerned: obviously a marriage rite preserved under particular circumstances. Esse in capillo was in the Middle Ages a phrase to indicate that a girl was still unmarried. The hair of Roman bride was cut and dressed by the *pronuba* (i.e. the woman in attendance on the bride) on the day before the marriage. The instrument used for this dressing was a curious counterpart of the porcupine's quill which was essential in the Indian *simanta* rite, to wit a *hasta caelibaris* or *hasta recurva:* although the ancient authorities do not provide us with a plausible explanation this probably was a curved spear which had by pentrating into the body of a gladiator reached its aim and was therefore filled with a special power derived from the killed or wounded fighter. The shaven head was often covered by a cap or shawl, a practice still surviving among religieuses. Sometimes, for instance in England, by such a covering of the head. Hence no doubt the German expression *unter ie Haube bringen* "to give (a girl) in marriage."

It may further be considered an established fact that some essential features of the marriage ceremonies as celebrated in different parts of the ancient Indo-European world are, in the main, to a considerable degree identical. This strong resemblance can best be explained by the hypothesis that these elements were already known in the common Indo-European period. The *vivaha-* of the Indians, the *domum deductio* of the Romans, the ancient German *brutlouft* (Old High German) or *brydlop* (Old English), *brullaup* (Old Norse), etc., like the Greek phrase *yuvaixa áyeava* and the Latin *uxorem ducere,* refer to the no doubt very ancient ceremonial 'transfer' of the bride from her paternal home to the house of the bridegroom. Still more characteristic than this custom which must almost always have been in the nature of things are the custom known in ancient Greece as *xara/vaµara,* the showering of handfuls of nuts, figs, corn, rice and other auspicious, i.e. in *casu* fecundating, objects over the bride, still practised for instance in England and also known to the Indian, Baltic and other I.E. peoples; the above mentioned rite with the 'Schossknabe' and the

previous ceremonial crossing of the threshold: the use of an animal's hide (sheep-skin) is for instance known to the Romans and the Slavonic peoples, the carrying of the bride over the threshold of the new home to the Germans, (he art with the boy in various regions; the rite which not only in ancient India, but still in modern European countries, belongs to the essential acts of the whole ceremony, called *panigrahana-* "taking hold of the bride's hand" in India, *dextrarum conjunrtio* in ancient Rome, and underlying the etymological identity of the Old German *mund, munt* originally "hand", then also "protection, guardianship (the husband becoming guardian to the bride)" and Latin *manus:* the bathing of the girl before the marriage (Greeks, Slavonic peoples); the prominent part played by the important elements fire and water: the Roman marriage *aqua et igni,* the Indian and Lithuanian threefold circumambulation of the domestic fire etc.; the three days' period of continence, which, though not often attested in literary sources and apparently unknown to part of the I. E. world, must be connected with the European *ius trium nortium* and similar observances in other countries; and other identical or similar traits in regard to rites or terminology which may for the sake of brevity lie left unmentioned here. What must, however, be emphasized with regard to the survival of these customs in India, is that they, like other practices pertaining to family life, came to be incorporated into the ritual which formed the subject-matter of the Grhyasutras.

Since the hair-dressing rite likewise belongs to those marriage serenionie which were common to several ancient I.E. peoples it may, in my opinion, be supposed to have had that character also in prehistoric India. Kausika and Manava 1, 12, 2 may therefore, I would hold, be considered to have preserved the ancient tradition in having the rite performed as part of the marriage ceremonies. It it, therefore an alluring supposition to lake the *kamcukam* and the *kamdakam* mentioned in the commentaries on Kausika 79, 14 to be put on the head of the woman for a cap or shawl and the counterpart of the German 'Haube'.

It seems further impossible to deny that the ritual described in the Grhyasutras as we know them is, historically speaking, no unity. Side-by-side with customs of Indo-European origin there are rites and practices of other provenance, part of which can be paralleled by. It can easily be conceived that as a result of this development, those ceremonies which were to follow immediately after the entering of the new house, increased in importance. Centering in the consummation proper they marked the beginning of married life. Those ceremonies of the 'second series' which originally pertained to wedding, i.e. to the bride's being given to a young man who is received as a guest in the house of her father, and to the tying of the social and spiritual bonds between the young people, could easily he reinterpreted and brought into connection with married life, with consummation and pregnancy. This process was faciliated by the fact that such rites as the *garbhadhana* had found a place among them. In some texts the *garbhadhana*—which is a rite to be performed periodically—has been completely united with the *caturthikarman,* which takes place only once in miarried life. In part of our sources, e.g. Kathaka G.S. 30, 8; cf. also Baudhayana 1, 7, a rite called *garbhadhana* takes the place of the rite described as *caturthikarma* in Sarikhayana (1, 18 f.); Paraskara (GS. 1, 11) and Apastamba (8, 10 f.). In some dharma works the terms *niseka-* (impregnation) and *garbhadhana-* have even become equivalent

(e.g. Manu 2, 16; 26, cf. the comm.).

Returning now to the *simantonnayana* it is hardly surprising to fid that it also assumed, in the course of the Vedic age, another character. Being separated in the tradition of most schools from the wedding rites to which it—if I am right—originally belonged, it came to be re-interpreted as a practice pertaining to conception: cf. e.g., in Sankhayana's description: the woman must drink water with unground corn, an act accompanied by RV. 10, 184, 1 "Let Visnu prepare the womb; ...let Dhatar make you an embryo and 2. 32, 4-9 which unmistably refer to conception. There are, however, in addition to the above passages in Kausika and Manava, traces of its former function and position in the sequence of rites. The commentaor Visvarupa, in explaining Yajnavalkya 1, 11 expressly asserted that the *simantonnayana* is—as opposed to the other rites pertaining to pregnancy, which were to be celebrated again and again—the only *samskara* which has to be performed once only, adding that this opinion was in consonance with the usage in his days. Apararka in commenting upon the same text, and Laghu-svalayana (one of the many later works on rites and customs) 4, 18, records the same opinion. It is interesting to nuts that other authorities held the same view with regard to the *garbhadhana* rite: compare for instance Medhatithi, on Manu 2, 16, who on this point find himself in conflict with those experts who asserted that it should be repeated. The origin of these divergence of opinion resided in another debatable question: were these rites *samskara* for the unborn child or for the woman? Those who held one, or either of these rites to be repeated considered them to be performed for the sake of the child, the others regarded them as samskaras of the woman. This very discussion appears to reflect the change of function which these rites had undergone.

Another detail may be noticed also. Then is not only, as we have seen, great divergence about the month in which the *simantonnayana* was to be performed, but also about its relative position in the sequence of *samskaras*. Part of the sutras (Apastamba, Hiranyakesin, Bharadvaja, Kathaka, Laugaksi) insert it before the *pumsavana*, part of them (Asvalayana, Baudhayana, Paraskara etc.) after that rite. Apastamba 14, 9 who belongs to the former group says that this rite must be performed when pregnancy becomes apparent. This points to an earlier moment for the *simanta* rite, which again may perhaps be explained as a reminiscence of the period at which this rite preceded all rites pertaining to a successful conception. In this connection special attention should be drawn to a stanza which in many Grhyasustras in prescribed in one of the other chapters dealing with the rites pertaining to conception, pregnancy of birth: "O you whose hair has been well parted, that heart of yours which rests in the moon in the sky, give us of that immortality; may I not weep for evil concerning my children", or according to one of the variants: "...may you never fall into sorrow about your children". If this stanza be not thoughtlessly borrowed from other schools it may in those sutras who have in pronounced before the performance of the *simanta* rite (Asvalayana; Paraskara), again, point to an order of the *samskaras* in which the parting of the hair came before the conception rites.

Now the interesting practice recorded by Gobhila (G.S. 2, 7, 9 ff.; cf. also Khad 2, 2, 26

ff.; Jaim, 1, 7) deserves brief attention: "a dish of rice and sesamum, covered with ghee (is cooked); he causes her to look at that (dish), after having asked: what do you see? similar traditions of other peoples. Part of the subject matter of the Grhyasutras may be called Atharvanic, consisting of charms and spells, magico-religious rites and other practices which probably were at first added to the inherited rites by way of precaution and which may be supposed to have been introduced, in the course of time, and often still in a more or less facultatie way, into the ritual accepted and handed down by the many communities whose traditions have crystalized in the book which have been preserved. (133) The prescription in Grhya- and Dharmasutras with regard to the evil characteristics to be avoided when choosing for instance a bride suggest such charms as are found in AV. 1, 18 ("against unlucky marks in a woman") and put into practice in Kaus. 42, 19 (the face of the unlucky woman must be sprinkled with a special potent liquid). Incidentally even sorcery practices designed to oust a rival or co-wife from her position (Apasi GS 3, 9, 4 ff. AV. 3, 18) found their way into this grhyaritual.

In all probability such rites as the *garbhadhana* and the *pumsavana* belong to this category: the Atharvaveda as well as the Kausika-sutra contain, among the many texts and practices pertaining to women, various formulas and stanzas in order to secure conception or the birth of a son. The Grhyasutras reproduce, as we have seen, with more or less variation a large number of the stanzas of the Atharvaved devoted to these subjects. Even texts which have no apparent connection with these purposes are prescribed in the relative ceremonies: thus AV. 1, 1 which properly seems to have belonged to a rite for the retention of sacred learning and in ceremonies for the welfare of a Vedic student.

It would appear that the history of the *garbhadhana* rite was, in brief survey, the following. In the Atharvaveda 5. 25 there is nothing to make us believe that is specially pertained to the consummation of the marriage or to the first months of married life; these stanzas as well as the Kausika passage (35, 5) in which they are ritually applied refer to any cohabitation desired to be successful. So does the *Brhadaranyaka-upanisad* (6, 4, 13; 19-22) which in explaining the sexual act as a kind of ritual performance quotes AV. 5, 25, 3 and 5, stanzas which belong to those which are, with other mantras quoted in this passage of the Upanisad, prescribed, in some Grhasutras, for the *garbhadhana*. Yet Asvalayana's sutra, which 1, 13, 1 in dealing, in one chapter with *pumsavana* as well as *anavalobhana* (the ceremony observed to prevent miscarriage) evidently refers to this passsage. It explicitly states that the Upanisad mentions the ceremonies of *garbhalambhana*, which appears to be another name for the same rite, *pumsavana*- and *anavalabhana* (guarding against danger to the unborn child). The late and somewhat isolated Vaikhanasa sutra describing the *samskaras* in the following order: marriage followed by the rite of the fourth day and two chapters on the sacrifices to be performed by the husband, the *niseka*- (impregnation) after the period of three days, the *rtusamgamana*- (i.e. the rite properly belonging to coition after any monthly courses), *garbhadhana*-, *pumsavana*-, *simantonnayana*-, and after an offering to Visnu, *jatakarman* (birth) (Vaikh, ch. 3), deviates from the rule observed in those other grhya texts which begin the description of these *samskara* in connection with a new individual with the *umsavana*, combining the *garbhadahana* with the *caturthikarman*. The very controversy with regard to

the question as to whether these rites were a *samskara* of the unborn child or of the mother may, in my opinion, be taken as an indication of their losing their original character.

It should further be borne in mond that in prehistoric and ancient Vedic times girls were, as far as we known, generally married after they had reached maturity. At the Rgvedic period child marriage was evidently unknown, although, as a matter of course, 'engagements' of children—mention of which is also incidentally made in the literature of the related I.E. peoples—may have occurred. But, as is well known, the age of marriage for girls was, in later times, and this rather early, often reduced. It appears from several considerations that at the period of the Grhya- and Dharma-sutras they were married just before the time of puberty or immediately after it. This probably was the beginning of the custom of child-marriage. When this practice became usual, the marriage ceremonies were divided into two parts, the first until the transfer of the bride to her new home, before the age of puberty, the second beginning with the *prayana-* (departure) and the *grhapravesa-* (the *domum deductio)* after that moment. Hence the misconception found in European reports on Indian family life calling this continuation of the rites the 'second marriage ; he causes her to say: 'offapring' (in the Jaim. G.S. the answer is quoted in full: children, cattle and good luck for me, long life for my husband); that dish she should eat herself; brahman women should sit down beside her whilst pronouncing auspicious words, viz. '(you) should be the mother of heroes, the mother of living children, the wife of man who lives'. The auspicious words remind us of *Snnamantra-brahmana* (a collection of the stanzas used in performing the ritual acts) 1, 2, 17 II and 1, 1, 13 "be a mother of heroes, of living children, love the gods, be friendly, bring luck to (over) two-footed once and to (over) four-fooled ones; be the wife of a man who lives, be illustrious (i.e. extend your power for good) in the world of your husband, looking on well-disposed offspring ". Now, Mantrabr. 1, 2, 17 forms pan of the stanzas used in the *paniyrahana-* ceremony ("the taking hold of the bride's hand") ; or it is, in other sources, prescribed at other moments of the wedding ritual. Similar words, RV. 10, 85, 42 ff., were according to Sankh. 1, 16, 12, used in introduring the bride into her new home. To make a long story short: these formulas, like the mantras resembling Manlrabr. 1, 1, 13, properly belong to sequences of auspicious words pronounced during the celebration of a wedding. Their very meaning corroborates this view: the references to husband and offspring need no comment and the injunction to look at the dish may perhaps be interpreted as follows: As the glance of the bride had, by formulas such as Ath. V. 14, 2, 17 a "with an eye (that is) not terrible", to be made in offensive before the was accepted by the bridegroom and her family, so her eye should also be conjured "to see", positively, "offspring". It may be noticed that another such question: "what do you drink?", answered with "procreation of a hero" occurs, in Asvalayana (I, 13), in the chapter on pumsavana.

The wish to accompany every important event in life by an apposite and significant rite on the one hand, and predilection of the ancient Indians for systematizing on the other has, I would suppose, induced those whose opinions are the basis of the prescriptions of the sutra texts: to fix the order of these rites including the *simantonnayana*. That there is so much difference of opinion in regard to their relative position must, then, like the great

divergence of other details, be explained from the comparatively recent character, not as is held by Kane, of the rites themselves, but of their combining into the more or less complete series as we know these from our sources.

Thus the alteration of the mode of wearing the hair gradually developed into the rite for the sake of a prosperous pregnancy. Those elements which are similar to features in the pumsavana ceremony, or remind us of the *cudakarana.* as well as the use of formulas hinting at child-birth are, in my opinion, later accretions integrated when the rite had already assumed its new character. It may be surmised that gome schools even borrowed for instance from the ceremonies of hair-cutting and beard-shaving in order to complete the *simantonnayana.* It seems also a reasonable assumption that the magico-religious performance described by Kausika 35, 20 (the above-mentioned *simantonnayans),* which is characterized by the hanging of two mustard-seeds on the neck of the woman, is a piece of evidence of a sometime autonomous rite which, as the tying of the garland of fruits or barley grains round her neck, has combined with the parting of the hair. Here we must again refer to Manava, who after discussing the *simantonnayana* in the narrower sense of the term (1, 15) inserts in 1, 16 a *strikarman* (rite pertaining to a woman), which being a *pumsavana,* mainly consists in adorning the woman with sandal and flowers, and in fastening a garland of fruits round her neck —which in other texts is a feature of the *simanta* rite — and a circumambulation. It may be noted that it is this element of the rite which has, according to Kane, survived up to modern times: in Western India some people continue performing a rite in the eighth month of pregnancy which retains some vestige of the ancient practice, *inter alia* a garland of *udumbara* fruit. Curiously enough the most characteristic feature of a *pumsavana,* viz. the putting of a pounded *nyagrodha* (or other) shoot into the woman's right nostril is in Manava's account omitted. This is further evidence of the peculiar character of this text, The Kathaka G. S. 32, which has the parting of the hair executed in the third month of pregnancy (31, 1), agrees with Manava in placing this *srikarman (pumsavana)* not at the usual lime (the third month), but at a later moment, and in omitting the putting of the pulverised shoot into the woman's nostril. After describing the *simantonnayana* it has the same precept (31, 5) which it given by Manava (1, 16, 2) at the end of the *srikarman,* to wit: "He should honour the brahman who is his giver."

Finally, there remains to be considered the question as to the original meaning of the practice of altering the hair-dress of a woman on her wedding-day. In contradistinction to other Indo-European peoples the ancient Indians have not left much information about the custom. Yet Asvalayana G.S. 1, 7, 16 contains, betweem the offerings of the parched grain and the ceremony of the seven steps, an interesting injunction: the brahmana must loosen two locks on either side of the head of the bride and tie to it two locks of wool instead. By this act the young woman was evidently freed from the bonds with which she was tied to her family, since in performing it the stanzas Rgveda 10, 85, 24 f. (cf. Ath. V. 14, 1, 58; 18 f.) were pronounced, which containing inter alia the words "I release (her) from here, not from there" are prescribed at the moment of departure from the bride's paternal home. In the wedding ceremonies described by Kausika the words "I release you from Varuna's fetter..." have found a place (that is to say : Ath. V. 14, 1, 19) at a rather early

moment, to wit before the washing of the girl; they are to accompany the act of loosing the scarf (*vesta-*) tied on the girl. She, is, however, to put on this scarf thrice again; meanwhile Ath. 14, 2, 52 it recited: "eager, these young girls, going to a husband from the father's world, have abandoned the consecration". This consecration (*diksa)*, the commentator Haradatta on Apast, 2, 6, 2 no doubt rightly explains, is the *kanyakavrata*, her life as a girl implying the moral, social and religious duties and observances required by that position. A similar custom existed in ancient Greece: "Das Madchen nimmt (durch das Haaropfer) Abschied vor der Ehe von den Gottinnen, die die Zeit ihrer Junpfrauschaft beschutzt haben." According to another formulation of we idea of departure or leaving girlhood the rite is performed "weil das Madchen aus dem Standade der Unvermahlten scheidet; bei einer Wiederverheiratung fand er nicht staff". Would it be too audacious an hypothesis to consider the woolen locks mentioned in Asvalayana's sutra to have been substitutes for a more original 'Haube' with which the girl was to be covered when she married? In this connection an interesting custom mentioned in the Varaha G.S. (16, 11) seems to be of some significance: the young husband must, on the occasion of the *simantonnayana* and after the central act plait the hair of his wife so as to form two tufts or braids with a blue and red cord or with wool made of the hair of an animal which is still alive. A similar prescription omitting however the use of wool is imparted in the Kathaka G.S. 31, 4: "he hind" with a blue and red cord the sides of her hair together so an to form two separate parts". As is widely believed these two colours, red and dark-blue, have an apotropaeic power. In magico-religious rites they are very often used; red is the colour of fertility, sexuality, marriage; dark-blue belongs to the chthonian powers including the representatives of vegetation; this combination is in the first place 'erotic'. The important part played by these colours at marriages, confinements etc. has often been pointed out by Zachariae and other scholars.

In the Varaha (16, 8) and Kathaka sutras (31, 2) the 'comb' used in executing the main act of the rite is said to have been made by Indrani. As Sankh. (1, 12, 6 ff.) says that the bridegroom must, after the bath or Indranikarman, present the bride with a garment, a mirror, and a porcupine's quill, we probably may believe this statement to be another reminiscence of the wedding ceremonies. May we even go so far as to suppose the quill to have been originally given to the bride with a view to the simanta rite which was follow immedialely?

After having described the *simantonnayano* proper the Kathaka G.S. (31, 6) as handed down in the so-called Devapala tradition has the interesting statement: "like what precedes it also the putting up of the braids of hair of girls; then also (takes place) the an-ointing". From Devapala's commentary it appears that at the same time the rite of putting up the braids must be performed on those girls who have been promised; ointment is to he used which is of the same colour as the the hair so as to have the same effect as the *simanta*; a stanza corresponding to RV. 6, 52, 15 requesting the gods of heaven, earth and water to refresh the whole of man's lifetime and to give him relief is to be recited. Then the *simantonnayana* is perfect. Is this a trace of the old usage or a local custom which found its way into a sutra text?

T

Tantravārtika and the Dharmaśāstra Literature

The *Tantravārtika* of the great *Mimāmsaka* Kumārilabhaṭṭa is, apart from its depth, subtlety and abstruseness, replete with information on various topics. Among other subjects it sheds a flood of light on the ancient *Dharmaśāstra* literature. As it is now generally agreed that Kumailabhatta flourished about the middle of the eighth century AD, the incidental notices of the *Dharmaśāstra* literature contained in the *Tantravārtika* are of great value for the understanding of the development and chronology of that literature. In the following pages an attempt is made to bring together important passages bearing on that literature contained in the *Tantravārtika*.

Among the *Dharmasūtras* Kumarila quotes the work of Gautama more frequently than any other. In some cases Gautama is mentioned by name; in other cases, his work is quoted simply as *Smrti* or he is refereed to as *Smṛtikāra*. There are at least a dozen quotations taken from the *Dharmasūtra* of Gautama. In one place Gautama is spoken of as Gautamācārya. In another place it is said that practices opposed to Vedic tradition are declared by Gautama not to be binding. As contrasted with the tenets of Bauddhaas, Gautama is said to be based on *Veda*. Gautama allows a person to practise the vow of 'studenthood' either for twelve years or for 24, 36, or 48 years. Two Sūtras of Gautama are quoted with slight variations.

The *Sūtras* mentioned in the footnote below are quoted as *Smṛti*. Some *Sūtras* are styled simply as vacana or *āgama*. In a few places, though there is no *Sutra* actually quoted, it appears as if the author has in mind the words of Gautama. In one place Kumarila seems to be referring to an ancient reading of the *Dharmasūtra* of Gautama.

The *Dharmasūtra* of Āpastamba is refereed to in a few cases. "Āpastamba has laid down that certain practices are allowed in certain countries, though they are prohibited in others." In another place it is said that if a doubt arises, on account of the words of

the *Āpastamba-Smṛti*, that the absolute prohibition of drinking (in some *Smrits*) is counterbalanced, that doubt is removed by the direct Vedic injunction "therefore a brāhmana does not (should not) drink liquor." This seems to be a reference to the words of the *Dharmasūtra* of Apastamba laying down that "one who drinks liquor should (by way of punishment) drink wine as hot as fire".

The *Dharmasūtra* of Baudhāyana is referred to in one place as being in conflict with the words of Āpastamba. Āpastamba allowed certain practices in certain localities though they were opposed to Vedic tradition and declared that they were sinful in other countries. This dictum of Āpastamba is refuted by Baudhāyana who cites only examples of sinful practices opposed to *Smṛti*. Baudhāyana seems to be quoted in yet another place.

There is in the present work at least one quotation from Śankha-Likhita. It is cited for showing that the word *āmnāya* is applied to *Smṛti* works also. It is noteworthy that the words quoted are not in prosed but are a line of an *anustubh* stanza.

Quotations from other *Dharmasūtras* could not be identified, if they exist at all in the *Tantravārtika*. *Dharmasūtras* are said in one place to give instructions about the duties of the castes and estates and that, as the *dharmas* are mostly uniform, the *Dharmasūtras* agree with one another and are called *Smrti* equally with Angas. The *dharmasūtrakāras* are also referred to in another place on the binding character of usages.

The *Tantravārtika* stands in a special relation to the *Manusmṛti*. Whenever Kumārila speaks of *Smrtis*, that of Manu is uppermost in his mind. He quotes it or refers to it even before the *Gautamadharmasūtra*. He often refers to the *Manusmṛti* as *Mānava*, Which latter words is found very often in the *Dharmasūtra* of Vasistha. Over at least twenty verses are wholly or partly quoted from the extant *Manusmṛti*. The quotations are scattered over all the chapters from the first to the last. In some cases the verses of Manu are not actually quoted though they are referred to in such a way that identification is quite easy. A few verses or parts of verses quoted in the *Tantravārtika* as Manu's have not been traced. It is remarkable that a verse which is treated in the editions of the *Manusmṛti* as interpolated, because it has not been commented upon by commentators like Medhatithi and Kullkūa, is quoted in the *Tantravārtika*. The text of Manu that Kumārila had before him was essentially the same as that we now have, and the *Manusmṛti* was, according to him, the highest authority on matters of *dharma*. It is not probable that this position could have been attained by the *Manusmṛti* in a century or two. Therefore, the extant *Manusmṛti* must be several centuries older that AD 750. Modern scholars detect earlier and later portions in the *Manusmṛti*. Kumarila looks upon all parts of the extant *Smṛti* as equally authoritative. If we have to postulate two redactions of the *Manusmṛti*, then the earlier one, out of which the extant *Smṛti* could be said to have grown, must be placed centuries earlier than the date to which the extant *Manusmṛti* can be assigned. This conclusion is immensely strengthened by the fact that Śabarasvāmin, the ancient commentator of Jaimini's Sūtras, seems to have looked upon the extant *Manusmṛti* as an authoritative *Smṛti*. For example, in his *Bhaṣya* on the *Pūrvamimamsā* (VI.1.12) he says "whatever is acquired by her (scil, the wife) in another

manner must become the property of her husband and (an author of a *Smṛti*) declares, 'the wife, the slave and the son are all without wealth', etc." In another place he says "Manu and others have given directions." This is not the place to discuss the date of Sabara. But from his archaic style and from the relation in which he stands to Kumarila, it may be said that he his certainly not later than AD 500 and may be earlier by a few centuries.

Kumārila starts an extremely interesting discussion about *Sadācāra*. He quotes the *Sūtra* of Gautama (I.3) "transgression of *dharma* and also rashness are seen among the great" and then observes that many high personages such as Prajāpati, Indra, Vasiṣṭha, Viśvāmitra, Udhisthira, Kṛṣna-dvaipāyana, Bhisma, Dhṛtasastra, Vāsudeva and Arjuna were guilty of transgressing the Law and even people of his time do the same. He then sets out in detail how these high personages of old transgressed the Law and tries to explain away most of the transgressions. Some of his explanations are quite after the manner of modern scholars of comparative mythology. The charge brought against Kṛṣna-dvaipāyana, is that, being a 'perpetual student', he produced offspring on the wives of Vicitravīrya. This is explained away on the ground that he was ordered to do so by the elders as also on the ground of his great *tapas*. Vāsudeva and Arjuna are blamed for having married Rukmini and Subhadra, who were respectively their maternal uncle's daughters, and for drinking *surā* (liquor). As to the charge of drinking *surā* the answer is that *surā* which was produced by fermentation, etc., from food was forbidden to the three higher castes, but *madhu* (mead) and *sidhu* (rum) were not forbidden to ksatriyas and vaisyas, and that as Vasudeva and Arjuna were ksatriyas and had only taken *madhu*, there is nothing wrong in their conduct. As to the charge of marrying one's maternal uncle's daughter, the explanation is that in common parlance one's maternal aunt's son is also called brother and hence Subhadrā, though described as the sister of Vasudeva, must have been the maternal aunt's daughter or the daughter of Kṛṣṇa's mother's paternal aunt's daughter (and so there is nothing wrong in Arjuna's marrying Subhadra). As to Vāsudeva's marriage with Rukmiṇi the reply is—"How can he who was an exemplar (lit. mirror) to all the worlds and who said elsewhere (in the *Bhagavadgitā*, III.21 and VI.11) 'whatever a great man does, other people do he same; people follow what he looks upon as authoritative; and men in every way would follow in my path,—set up a practice that is forbidden?"

Kumārila then says ha even in his day brāhmaṇa women of Achicchatra and Mathurā drank *surā* (fermented liquor), that northern people gifted away, accepted and sold horses, mules, assess and animals with two rows of teeth and took food in the same plate with their wives, children and friends; while southern people married maternal uncle's daughter and took food seated on chairs and that both partook of food left or, touched by friends and relatives, ate betel (*tāmbūla*) that had come in contact with men of all castes, did not ceremonially rinse the mouth after eating betel, put on clothes brought on the backs of asses and washed by washermen and did not stop intercourse with those who committed the great ṣins except brahmana murder.

It has been said above (note 4) that Kumārilabhaṭṭa looked upon *Purāṇas* as authoritative works in the department of *Dharma*. The *Purāṇas* he means are not those ancient works to which reference is made even in the *Upaniṣads*. His remarks in other places show that he refers to the *Purāṇas* that are now extant. In one place, among the topics of Puranas he enumerates the divisions of the earth, the lineage of royal and other families, the measures of time and distance, and future history. In another place he quotes a verse which occurs both in the *Viṣṇu Purāna* and the *Mārkandeya Purāṇa*. He says that according to some by *svarga* is meant the top of Meru as established by reasoning in the *Itihāsa* (i.e., the *Mahābhārata*) and the *Purāṇas*. In another place we are told that the *Purānas* speak of the Baudhhas and others who will bring about the confusion of Dharma in the *Kali age*. Thus it is beyond doubt that at least some of the extant *Purāṇas* existed in his day and were looked upon by him as authoritative in the province of Dharma equally with the *Smṛtis* of Manu, Gautama and others. This irresistibly leads to the conclusion that some of the extant *Purāṇas* were composed several centuries before AD 750.

The foregoing will, it is hoped, give some idea as to how a close study of the *Tantravārtika* will yield valuable results for the history of the *Dharmaśāstra* literature.

Tilaka Mark

In modern times Hindu women whose husbands are living have generally three ever-present distinguishing sings, viz,. They wear a neck ornament called *maṅgalsūtra* (or *māṅgalyasūtra*), they apply to the forehead *tilaka* (mark made with saffron, red powder or some other substance) or put vermilion in the parting of the hair, and they wear bangles (of gold, glass, etc.). In my History of *Dharmaśāstra* (Vol. II, p.537) I showed that the practice of wearing the *mangalasūtra* is not very old, is not known to any *Sūtra* or ancient *Smṛti* and that it is provided fro by such late *Smṛtis* as those of Śaunaka and Laghu-Āśvalāyana. The practice of applying *tilaka* was not dealt with in that work. A few facta about that practice are brought together here.

In the *Araṇyakāṇda* it is said that when the Sun (in his apparent motion) came to be associated with the southern part (of the celestial hemisphere) the northern quarter (of the skies) like a woman devoid of a *tilaka* mark did not appear beautiful (or to advantage). In the *Saundarānanda* of Aśvaghosa (IV.13) the heroine puts a mirror in the hands of the hero with the words "hold this mirror in front of me while I apply the visesaka mark". The *Amarakośa* says that *tamālapatra* (a mark made with musk on the forehead which resembles the dark leaf of *tamāla* tree), a *tilaka* (mark resembling sesame grain), *citraka* and *viśeṣaka* are synonymous and the commentator Ksirasvāmi adds that these are all different *tilaka* marks. In the *Raghuvamśa* (IX.41) Kālidāsa displays a fine play on the two meaning of *tilaka* (a tree, a mark on the forehead): "Not that the *tilaka* (tree) did not lend a charm (i.e., it did lend a charm) to the sylvan spot when it (the tree) was marked with lovely collyrium-like bees that fell upon its beautiful flowers, just as a *tilaka* (mark) set near beelike stretches of collyrium in the midst of floral wreaths (put on by her on the head) does enhance the charms of a young damsel."

In the *Kumārsambhava* also Kālidāsa reverts to the same imagery of *tilaka* (tree, mark) and the blue bees. In the *Mālvikāgnimitra* (III.5) the poet harps on the same idea when he states that vernal beauty treats with contempt the efforts of women to enhance the chars of their faces, viz. the colour of *alaktaka* dye applied to their lips by women is surpassed by the brilliance of the red Asoka flower; the *kurabaka* flower, darkwhite and raddish, throws into the shade the *visesaka* and the (beauty due to the) application of *tilaka* (mark) is esclipsed by the *tilaka* (trees or flowers) to which collyrium-like bees cling. In another place in the same drama, Kalidasa speaks of the face of the heroine turned away from the hero as one the *tilaka* mark (on which) was split up into segments by the knitting of her eyebrows. It should be noted here that Mālavikā who was only a maiden (and not a married woman) had a *tilaka* of dark-red hue on her forehead between the eyebrows. In the *Mṛcchakatikā* (I) the *sūtradhāra* asserts that the ground which is rendered dark and variegated by dragging about an iron pan appears more attractive like a young woman who has decked herself with a *visesaka*. The *Siśupālavadha* (III.63) speaks of divine Vāsudeva, the (*tilaka*) ornament of the three worlds, adding to the charm of the capital as a viśesaka does in the case of a young married woman (*vadhū*). There are double-meaning epithets applicable both to Vāsudeva and *viśeṣaka* which show that the *tilaka* on the forehead was round in shape and glossy dark in hue. The *Matsya Purāṇa* in the tale of Satyavān and Sāvitri makes the former say to his beloved "this sylvan spot possessing beautiful *tilaka* trees appears lovely like you who wear a beautiful *tilaka* mark."

In the *Kādambari* of Bāṇa there are frequent references to the *tilaka* on the forehead of women. Tārāpiḍa asks his weeping queen, "why does your forehead not bear a *tilaka* mark made with the paste of *gorocanā* (yellow orpiment)?" This shows that *gorocanā* was used for making the *tilaka* mark, while a little above the same passage shows that the cheeks were painted by ladies with figures made with saffron. On the birth of a prince to Tārāpida the women in the harem gave themselves up to dancing and singing to such an extent that their clothes were rent as under by the sharp tips of their arm ornaments when they violently collided with each other, but that they took care to have at least some portion of their *tilaka*s remaining (and did not allow the *tilaka* to be entirely rubbed off). In the gorgeous description of Patralekha who was presented to Candrāpida in the early morning on a certain day the poet states that her broad forehead was adorned by a *tilaka* of sandal paste that looked pale because it was stale (made the previous day).

These literary references are enough to show that from at least the beginning of the Christian era married women as well as maidens applied a *tilaka* (mark) on their forehead made with musk, saffron or even sandalwood paste. But these passages do not clearly indicate that the making of a *tilaka* mark on the forehead was an absolute necessity, a *sine qua non* in the case of all married women whose husbands were living. They rather lead one to infer that the *tilaka* mark was intended only to set off the charms of young ladies.

In the *Vṛddha-Hārītasmṛti* (ch.XI) the authore expatiates at length upon the daily duties of wives. In verses 86-87 it is prescribed that a wife should get up before her husband

in the last watch of the night, should perform *śauca* and brush her teeth, that she should have an auspicious bath and wear a white *sāri*, should sip water and apply white *ūrddhvapuṇḍra* with (holy) clay or with sandalwood paste or musk or with saffron, if (one or the other be) not available. The Śūdrakamalākara quotes from the *Madanaratna* a passage of the *Skanda Purāṇa* in which occur the following verses: a woman who desires long life for her husband should never be without turmeric powder, *kunkuma* (either saffron or red paste for applying to the forehead), red lead, collyrium, bodice, *tāmbūla*, auspicious ornaments (such as *mangalasūtra*, nosering, etc.), applying perfumes to the hair, braiding the hair, ornaments on the wrist and in the ear. These verses show that the *Saknda Purāna* required married women to apply saffron paste (to their forehead). It must, however, be said that there is hardly any *Smṛti* passage that expressly makes the applying of a *tilaka* obligatory.

The same result is arrived at in another but an indirect way, In the *Vṛddha-Hārītasmrti* (XI.205-7) certain rules of conduct are laid down for widows that do not become satis on the death of their husbands. A widow should always give up the perfuming of her hair, *tāmbūla*, using unguents and flowers, ornaments, coloured clothes, taking food from plates of bell-metal, taking two meals a day, applying collyrium to the eyes. In this long list no reference is made to the giving up of *tilaka*. So it appears to follow that *tilaka* was not an absolute necessity for women whose husbands were living; similarly in the *Skanda Purāṇa* (*Kāśikhaṇḍa*, ch. 4, verses 75ff.) there are many verses forbidding a widow to braid her hair, to sleep on a cot to apply unguents to her body, to wear a bodice, to wear coloured clothes, etc. But a direction not to apply *tilaka* is altogether wanting in that passage.

The *Matsya Purāṇa*, ch.260., gives a picturesque description of the image of Siva in the *ardhanārīśvara* form. It says, "the half representing Siva should have matted hair and the digit of the moon, while in the other representing Uma, *sīmanta* (parting of hair) and *tilaka* should be shown". The same chapter also describes the Umāmahesvara image and states that the goddess should be seated on the left thigh of Śiva and that she should be shown as resplendent with the *tilaka* on the forehead. It is not unlikely that the necessity for a *tilaka* on the forehead of women arose by analogy form the practice of males applying a *puṇḍra* mark to the forehead with ashes or sandalpaste. This last practice of applying ashes to the forehead, the head, shoulders, etc., with *mantras* is certainly old (*vide History of Dharmaśāstra*, Vol. II.pp.672-75).

The evidence of ancient paintings would have been very valuable in this connection. But extant paintings do not go as far back as the literary evidence carries the matter. Even the Ajantā paintings do not disclose that women had *tilaka*s on their foreheads. It is not unlikely that in the course of centureis the *tilaka* on the foreheads in some of the paintings even if it existed in the beginning might have become faint or become altogether obliterated.

TAPTAMĀṢA—DIVYA (Ordeal by Hot Coin)

The Taptamāṣa which happens to be the most extensively practised ordeal in India is introduced for the first item by Nār. The Taptamāṣa has been created by Brahmā himself to test the auspicious and the inauspicious, he points out. He describes a short procedure of the ordeal. He has however not given any details regarding the charges for which it could be used or the rules regarding the eligibility of the person (i.e. his caste etc. undergoing the trial, or the rules regarding the time and place of conducting the trial.

According to KP, however, the Taptamāṣa must be administered to a Śūdra.

The Taptamāṣa is often found grouped with Taṇḍula. Both the ordeals are introduced together by Nār. As we have seen above both the ordeals are recommended by Pit. for the disputes regarding thefts.

As the newly introduced ordeals, the Taṇḍula and Taptamāṣa were never considered to be on par with the original five ordeals. The Tandula and Taptamāṣa can be ordeals alright since they declare the result immediately after the trial, but they are the inferior ordeals and, therefore, not included in the list of the ordeal by Balance and others, points out Mit.

Considered from the point of view of the seriousness of the charges valued according to the cost involved, the Taptamasa happens to be an inferior ordeal.

PROCEDURE

NĀRADA

The purified one should immediately take some ghee in a vessel of gold, silver, iron or clay and put it on the fire. A well-decorated ring made of gold, silver, copper or iron, after having washed several times with water, should be put into it. When it goes down round the whirls)of the boiling ghee) and is thus very terrifying to touch, he (i.e. the purified one, the Prāḍvivāka) should consecrate that ghee with this mantra—" Oh ghee! you are the most pious nector in the sacrificial acts. Burn this person in front of you if he is sinful (i.e. guilty), otherwise be as cold as ice if he is pure. While examining the test, if his finger is found uninjured when touched, or if there are no boils on it, he is pure, otherwise not".

BṚHASPATI

Having invoked the truth, (the accused person) should take out, giving up fear, the heated piece from the well-heated oil and ghee by his thumb and fingers.

PITĀMAHA

Now, I shall tell the unfaulty (śubha) method of taking out the heated coin. A round

vessel of iron, copper or clay-four Angulas deep and 16 Angulas wide (in diameter)—must be duly prepared. It must be filled in with 20 Palas of ghee and oil. A golden piece must be placed in it when it is properly heated. (The accused) person should take out the golden piece by his thumb and finger.

He who does not shake his forehand or does not get any boil, or he whose finger does not blister happens to be pure according to Dharma.

There is an optional method:

The purified one should heat the ghee of cow's milk in a vessel made of gold, silver, copper, iron or clay. A well-cleansed ring made of gold, silver, copper or iron, washed once with water must be dropped in it. When the ghee is full of whirly ripples, when (it is so hot that) it could not be touched even by nails, it should be tested by a fresh leaf which may produce 'churu' noise (if the ghee is properly heated). (The Prāḍvivāka) should then consecrate the ghee with this mantra. "Oh Ghee! you are the most pious nector in the sacrificial acts. Oh! Purifier! you burn the sinful one and be cold as ice if he is pure!"

Having observed fast and taken bath, the accused person should then come there with wet clothes on. He should be asked to take out the ring dropped in the ghee. The examiners should then examine his fingers. If there are no boils, he is pure, otherwise, he is guilty.

KĀLIKĀPURĀNA

The person who does not shake his forehand or he whose forehand does not get red and remains free from the burning effects such as boils etc. is pure.

KUMĀRIKĀKHAṆḌA

Listen, now I will tell henceforth the procedure of the Taptamāṣa. (The Prāḍvivāka) should get a vessel of copper, of the size of 16 Angulas duly prepared. It must be filled in with 20 Palas of ghee and oil. A piece of gold of one Māṣa weight should be thrown in the liquid when it is properly heated. The mantra given in the fire ordeal should then be (written on a paper and) tied on the forehead of the person (to be tried). He may lift the heated coin by means of his thumb and the finger. The person should undoubtedly be taken as pure if he is free from (the burning effect such as) boils.

The important stages in the procedure of the Taptamāṣa are thus, (i) performing the common rites. (ii) heating of the liquid. (iii) dropping the metal piece. (iv) taking it out by the accused person. (v) signs of the success or failure of the trial.

(i) Common rites—

All the general rites common to the other ordeals such as invoking the Dharma ending

upto the tying of the Sirahpatra must be followed here before commencing the trial, the commentators point out.

(ii) Heating of the Liquid-

(a) The Vessel used-

Nar. has recommended any vessel made of gold, silver, iron or clay. He does not give the required size or the shape of the vessel. Br. is also silent on the point. Pit. is more specific in this respect. It must be a round vessel made of iron or clay. This is a realistic recommendation, golden or silver vessel is not practically advisable for the purpose. According to Pit. quoted by Smṛticintamani, it must be a round earthern vessel of 4 Aṅgulus height and must be of the size of a normal pah (Kaṭāha or Caldron). The stanzas possibly suggest the very shape of the vessel. It is pointed out in the next stanza that any other vessel can be used only if the Kataha type of vessel is not available. The Kaṭāha must be made of iron or clay. As per practices of the Uchalia tribe, we find that they use the earthern caldron which is specially prepared for the purpose by ordering to a potter, and the ordeal itself is known as Tel-Kaḍāi (vide Appendix I).

(b) Liquid used-

According to Nār., ghee must be heated in the recommended vessel. The variety of ghee is however not specified. Br. recommends the use of ghee and oil. So does pit., but he appears to suggest two options i.e. either it must be a mixture of ghee and oil or it should be pure ghee of cow's milk.

The commentators have worked on these two options. Pit. according to them suggests here two alternative methods of the trial. The two methods differ in following respects. (i) the liquid used. (ii) the piece dropped and (iii) the way in which the accused person is asked to take it out.

As regards to the liquid to be used, we find a group of writers suggesting a third alternative i.e. a mixture of ghee, oil and ghee of cow's milk. This is however not acceptable according to the SC since the mixture of ghee and oil on one hand and ghee of cow's milk on the other are two clear-cut alternatives of the option (Vikalpa) described in the Smṛtis as we find in the stock example of Vrihi and Yava which are quite independent (nirapekṣa) of each other. Reconciliation between the two alternatives therefore cannot be advised. The two options thus available are (i) a mixture of ghee and oil and (ii) ghee of cow's milk.

In the days of Alberuni we find that a mixture of ghee and oil was used (vide Chapter VII) but the digests round about 15th century are found discouraging this option. Pit. quoted by Smṛticintāmani points out that the liquid used must be pure. The oil is considered to be pure if it, visibly enough, is not very greasy or very thick. the ghee is considered to be pure if it is thick and does not flow down in throat like the stream

(of water). Pure ghee does not dry or parch the lips, palate and the throat.

Summarizing the procedure of the Taptamāṣa ordeal, Pratāparudradeva recommends the use of oil or ghee. During the Maratha period we find that pure ghee or oil was used for the purpose, however a mixture of the two also appears to be in vogue. From the accounts of the practices of various tribes in India we find that in most of the cases pure ghee or oil was used.

The oil or ghee used must be properly heated. The ring dropped must go down round the whirls of the boiling liquid points out Nār. Br. says that the ghee or oil must be well heated. According to Pit., the liquid must be so heated that there should be ripples and bubbles and that it could not be touched even by nails. A fresh leaf must be dropped into it which may produce 'churu' sound if the liquid is properly heated. It is to be noted that the method of testing the heated liquid by dropping a leaf into it described in the Smrtis is referred to by Alberuni also. The method was also practised during the Maratha period.

Pit. quoted by Smṛticintāmaṇi gives us the signs by which we can know whether the liquid used—oil or ghee—is properly heated or not. In the case of oil, there is a foam on the surface which indicates that the oil is properly heated, while in the case of pure ghee, reverse is the case i.e. the foam on the surface of ghee disappears when it is heated.

According to Pit. the piece is to be dropped when the oil is set on the fire and should be allowed to be heated alongwith it-till the liquid boils properly. According to the stanzas quoted by Smrticintamani, the liquid must firstly be heated to the boiling point and the piece is dropped only after the heated liquid is removed on the ground.

(iii) (a) Dropping the metal piece—

The piece to be dropped must be of a Māṣa weight. The SC points out that it must obviously be the golden Māṣa (Suvarṇamāṣa) which is equal to 1/16th Karṣa (or 5 Kṛṣṇalas) and not the Silver Māṣa (Rajatamāṣa) which is equal to 2 Kṛṣṇalas only which is too small to hold. The Māṣa here therefore must be Suvarṇamāṣa or Tāmramāṣa. VP also arrives at similar conclusion. According to VP the piece to be dropped must be a limp of gold or copper.

As an option to this limp of gold or copper, the writers have also recommended the use of a ring which may be made of gold, silver, copper or iron. We have already referred to the two options regarding the use of liquid. When the liquid used is the mixture of ghee and oil, the piece to be dropped must be in a lump form, but when it is pure ghee of cow's milk it should only be the ring, the writers point out.

Alberuni's account strictly confirms the Dh. details. A piece of gold was accordingly dropped into the boiling mixture. During the Maratha period, they used to drop an iron-piece known as Ravā and the ordeal was known as the Ravādivya. In most of the tribes, however, we find that no metal piece is used at all. Instead of that, the accused person

is asked to dip his fingers in the boiling oil. In some tribes, however, we find following variations:-The Koravans use a four-anna piece. The Ucalias drop a stone. The Tailangana Pariyan bride is asked to pick out hot cakes from the boiling oil to prove her chastity.

(b) Mantras to be used—

The Prāḍvivāka should invoke the boiling ghee with the mantra 'Parampavitramamṛtam' etc. He should invoke the fire with the mantra 'Tvamagnevedāścatvāraḥ' etc. While the accused person should invoke with the mantra 'Tvamagne Sarvabhūtānām.' The SC points out that fire used here must be ordinary fire (Laukikaḥ Agniḥ).

(iv) Taking out the Metal piece—

When a mixture of ghee and oil is used and the piece dropped is in the lump form, the accused person should take it out by his 'thumb and the finger' which according to the SC should mean the thumb and two neighbouring fingers known as Tarjani and Madhyamā.

When it is pure ghee of cow's milk and the piece dropped is a ring, the accused person should take it out by his forefinger only. This is clear from the fact that in this variety the judges are asked to examine only the forefinger of the accused person, Mit. points out.

The word 'Uddharet' according to VN suggests that the accused person should take out the piece from the boiling liquid (and hold it on). He should not throw it out.

(v) Signs of the success or failure of the trial—

The accused person is supposed to have undergone the ordeal successfully, (i) if he does not shake his hand (ii) if there are no boils. (iii) if the part of the hand dipped does not get red or (iv) when the forefinger used is not blistered. In all other cases, the person is declared guilty.

Jayapatra must be offered to the person who is acquitted, while the accused must be punished.

We have seen that the Taptamasa as introduced by Nar. happens to be an ordinary or a second-rate ordeal, but by 11th century, we find that it is getting prominence. It is considered as one of the very powerful ordeals. It is becoming more and more popular. This is evidenced through the later Dh. works as well as through the contemporary historical references.

(i) Āpastamba has asked the king to consider thoughtfully the cases in doubt either by inference or by an ordeal. (Sandehe lingato daiveneti vicitya, II. 29.6).

Explaining the Sutra, Haradatta (11th to 13th century) explains the word Daivena as Taptamāṣādina which means that the Taptamāṣa must be a leading ordeal in the days of the commentator.

(ii) Sobodhini (1360-1390) a commentary on the Mit. describes Taptamāṣa as a very sharp and hence a very powerful ordeal.

(iii) Dalapatiraja (1490-1570) the author of Nṛsimhaprasāda describes Taptamāṣa as the famous or the most established ordeal (Prasiddhaḥ).

Thus the prominence attained by the Taptamāṣa during the course of time is clearly reflected in these works. The Taptamāṣa was a powerful ordeal. There was growing demand for this ordeal.

Alberuni has described the ordeals in their succeeding higher order. The Taptamasa according to him is the second highest, first being the Agni. But during the Maratha period this ordeal has succeeded the ordeal of red hot iron ball (i.e. the Agni divya.) In Maharashtra, this ordeal is known as Ravādivya or the Mahādivya. 'The Ravādivya was in practice for about a period of 500 years from 13th to 18th century.......the Agni divya or the fire ordeal was not so common or popular as the Ravā divya'—observes Dr. V.T. Gune.

The customs of the various tribes of India also show that the Taptamāṣa was the most widely practised and the most dominating ordeal amongst all the ordeals.

Taṇḍula-Divya (The Rice Ordeal)

The nine ordeals discussed in the Dh. works are generally divided into two groups i.e. Dhaṭādīni (The Balance and others) and Taṇḍulādīni (The taṇḍula and others). Obviously, we find that the Balance and others represent the original five ordeals, while Taṇḍula etc. are the later additions. The Taṇḍula thus comes first in the second list of the ordeals. These ordeals are used for minor charges.

According to Pit., the Dhata etc. are used in the cases of Avaṣṭambha, while Taṇḍula and Kośa are utilised in the cases of Śankā. At another place, Pit. points out that Taṇḍula should be used only in the cases of theft, and not in any other case. Explaining this, SC, VP point out that, this need not be taken literally. In fact, Taṇḍula is to be used in general in all the cases relating with money and not only in case of theft as it is mentioned here. This can be concluded from the remarks of Kāt. according to which all the ordeals, in general, could be used in the cases like the resumption of gift. So, the real case to which the Taṇḍula is restricted is that of adultery.. This explanation given by the digests is really intended for removing apparent contradiction between various Smṛti texts and making them consistent. We get instances of this ordeal recorded in inscriptions. The trials took place in 1241 and 1275 A.D. In the first, payment of some money was in question and the second was a boundary case. These instances thus support the explanation given by the commentators and the digest writers. It will, however, be seen that the Taṇḍula was

particularly meant for the cases of theft. According to Pit. however, the Taṇḍula is meant for theft in general while for minor thefts, the Taptamāṣa is recommended. As per tribal information available, the Taṇḍula ordeal is particularly found used for the cases of theft.

According to Kāt. the Taṇḍula should not be used for the person suffering from the diseases of mouth, and the person who has taken a vow i.e. the vow of not eating rice, as it is explained by Vyavahāracintāmaṇi.

No special rules regarding the time and place of administering the Taṇḍula ordeal are mentioned. The ordeal was thus available in all the seasons. According to SC, the procedure of the Tandula ordeal continues for two days. From the procedure of the ordeal described in the Smṛtis, the digests conclude that the Taṇḍula ordeal must be performed in the temple of Sun.

PROCEDURE

Nārada

I will now tell the procedure recommended for eating rice. The rice should be given in cases of theft and none else, it has been decided so. Having purified himself. (the worshipper of God sun) should make white (i.e. unhusk) the grains of Sāli rice and of no other corn. He should immerse them in the water in which the God is bathed, and should keep them in an earthen pot before God Sun for the night. Having divided the grains in three parts, the worshipper of the God should personally give them in early morning, when it is (almost) night, to the accused person who has taken bath and observed fast and is facing east, after informing him of his duties in this test of the truth and the untruth and should ask him to eat and spit on an Aśvattha or a Bhūrja leaf, if the former is not available. If blood is traced or the teeth found decaying or limbs trembling, he is declared guilty.

Bṛhaspati

Having observed fast, the purified one should eat the grains of rice in a temple of Sun. He is pure if he ejects white saliva, but if it is mixed with blood he is guilty.

Kātyāyana

After eating the grains of rice that are immersed in the water in which the deity is bathed, if the person ejects pure saliva, he is pure, otherwise guilty.

Pitāmaha

Grains of Sāli and not of any other corn, must be unhusked. The pure one (the Prāḍvivāka) should keep these grains of rice before (the image of) god Sun, immersed in the water of the bath of Sun for the whole night. He should then perform on that night

all the general rites (of the ordeal) such as invoking Dharma, according to the recommended procedure.

In the morning, (the Prāḍvivāka) should give the rice-grains in three parts to the accused person who has taken bath and observed fast and is facing east. Having made him eat the grains, he should be asked to spit on a Pipal or a Bhūrja leaf if the former is not available. If the grains are not chewed properly or are found mixed with blood or if his saliva is not pure, he should be considered as guilty.

KAUMĀRIKĀKHAṆḌA

According to Kkh the Taṇḍula should be addressed by the following mantra. "Oh Tandula! you are given (for eating) by the knowers of Dharma for testing (the truth) of the human beings. You are praised for Truthfulness. Be worthy of protecting this person according to Dharma".

We thus find following points important in the procedure of the Tandula divya.

(i) (a) the grain of rice to be used. (b) immersing them on the previous day. (ii) Preliminaries to be observed. (iii) The trial. (iv) Signs of the success or failure of the trial.

(i) (a) The grains of rice to be used :

It has been pointed out by every writer that only the grains of śāli should be used in the trial. The grains are first to be made white i.e. they are to be unhusked. This is essential because it will help in detecting even the slightest stain of blood, if it is there.

The grains of rice are put before god Sun during the night. Obviously, it is the image of god Sun. Br. says that it must be the temple of god Sun. Later digests clearly point out that the ordeal must be conducted in Sun's temple.

(b) The grains of rice are to be immersed in the water in which the god Sun is bathed. Obviously, we find here a clear influence of the Kośa ordeal in which the accused person is required to drink three handfuls of the water of the bath of the deity.

In fact, the Taṇḍula appears to be a modification of the Kośa ordeal. Both, the Taṇḍula and Kośa, are recommended in the cases of suspicion. Chronologically, the Taṇḍula comes to be recognised next after the Kośa. The Kośa is physically a very mid trial. It is, therefore, possible that the Taṇḍula might have been developed out of the necessity of intensifying its effects.The grains of rice appear to be particularly selected for the purpose. Firstly, it would help in maintaining the divinatory significance of the trial on which the Kośa ordeal itself is based, as the grains of rice are always used in worshipping gods and have a special significance in the Indian ritualism. They, thus, have a special religious sanctity. Secondly, the chewing of the hard grains of rice would be at least able to cut the gums i.e. would cause some physical hardship—and would thus intensify the the trial part of the ordeal. It must, however, be observed that it would not be a difficult ordeal. It would

work psychologically more than being physically injurious.

D. C. Sircar gives following details regarding the Taṇḍula ordeal. The information is collected from the Asiatic Researches.

'The rice ordeal is generally applied to persons suspected of theft. Some dry rice is weighed with Śāligrāma or some mantras are recited over it and the suspected persons are severally asked to chew a quantity of it. As soon as it is done, they are ordered to throw it on the pipal tree or on some Bhūrjapatra.

The man from whose mouth rice comes dry of stained with blood is pronounced guilty and rest innocent.'

If we compare the details given here with those available in the Dr. works, we find that (i) the earlier writers have not said anything regarding the quantity of rice that is used for the ordeal. Only Śukranti makes a reference to it, according to which rice-grains of one Karṣa weight (-- 16 Māṣas) are used for the purpose. As per details given by Mr. Sircar, the rice is weighed against Śāligrāma and that much quantity is taken for the purpose. (ii) The procedure of immersing the rise in water of the bath of god Sun for the night is dropped. Instead, we find that the rice is consecrated and weighed against Śāligrāma. The divine intervention, the essential part of the trial is thus secured by a less elaborate and direct method. It has another advantage also. According to the Dh. description, the accused person chews wet rice which is in fact rendered soft by keeping it under water for the night. As per details given by Mr. Sircars the accused person chewed dry rice, which could be really testing.

(ii) Preliminaries to be observed

According to Nār. we find that the preliminaries in the temple are preformed by the worshipper of the God. Explaining the procedure of the Taṇḍula ordeal, the Mit. points out that all the verbs used here are the causal forms. It, therefore. means that the Prāḍvivāka gets those various things done from the accused person. The DT observes that the causal forms also indicate that all the preliminary rites common to the other ordeals such as invoking Dharma etc. should be conducted here.

(iii) The trial

The trial part of the ordeal is the simplest possible one. The accused person should chew the given rice. According to the Dh. rules, the quantity of the grain should be chewed in three parts. According to the method described by D.C. Sircar, the accused person chewed the grains severally.

(iv) Signs of the success or the failure of the trial

The person is considered to be guilty if— (a) there is blood in the teeth. (b) if the jaw

or palate is injured or bleeding, (c) if the grains are not chewed property, (d) if any of the limbs is found trembling.

We have already observed that the method operated psychologically more than being physically injurious. The signs mentioned in (c) and (d) above clearly show the psychological effects.

It must be pointed out that the signs that determine the success or the failure of the trial are made consistent with the kind of grain that the person is required to chew; for, it is just possible that the hard particles of rice chewed under psychological tension may bruise and cut the gums causing them bleed. In a similar Anglo-Saxon ordeal, we find that the accused person is required to eat bread and cheese consecrated. If the person swallows it, he is innocent. In case of guilt he would feel 'dry-mouthed and chocking with terror to get it down'.

Mr. A.E. Crawley, classifies the Indian Rice ordeal under the ordeals which depend on the influencing of the masticatory process. "Ancient and modern India and Medieval Europe employed a test which depends on the influencing of the masticatory process. In the rice ordeal, the Hindu took into his mouth some grains of rice and ejected them on a pipal leaf. If the grains were dry, his guilt was established. It they were moistened with saliva he is innocent. Previously, the rice was consecrated or charmed. The same ordeal is employed in Indonesia", he points out. The rice ordeal is a popular ordeal. It is often-times found resorted to by the Indian people.

V

Vijñāneśvara and the Predecessors

The *Mitākṣarā* of Vijñāneśvara occupies a peculiar position in the legal literature of India. Under the decisions of British Courts in India, the *Mitākṣarā* is of paramount authority in matters of Hindu law in the whole of India, except in Bengal where the *Dāyabhāga* is supreme. The *Mitākṣarā* holds a position similar to that of the *Mahābhāṣya* of Patañjali in Grammar or the *Kāvyaprakāśa* of Mammata in Poetics. It embodies in itself the results of centuries of legal speculation that preceded it and becomes in its turn a source of further exegesis and improvements. It is therefore interesting to see who the predecessors of Vijñāneśvara were to find out, what views were either originated or elaborated by them and to estimate the debt of Vijñāneśvara to his predecessors. In the following paper, no account is taken of the *Smṛti* writers that preceded Vijñāneśvara. Attention is centred only upon six writers who are named by the *Mitāksara* and who wrote either commentaries or nibandhas on the *Dharmaśāstra*. Those six writers are Asahāya, Viśvarūpa, Bhāruci, Medhātithi, Srikara, and Dhāreśvara. In the following M. and V. respectively stand for the *Mitāksarā* and Vijñāneśvara.

Asahāya

The M., in explaining the verse of Yājñavalkya (II.124) that unmarried sisters are entiled to have their marriages celebrated by their brothers who are to give a fourth share to them, says that the explanation of Asahāya and Medhātithi of the words 'fourth share' stands to reason (viz., that the sister gets a fourth of what her brother of the same class as herself gets) and not that of Bhāruci. The only work so far known as Asayāya's is his commentary on the *Nāradasmṛti* which was revised by Kalyanabhatta. Dr. Jolly's edition of the *Nāradasmṛti* (B.I.Series) contains a portion (viz. up to the middle of the 5th chapter) of the revised version of Asahāya's *bhāṣya*. What liberties Kalyānabhatta took with the *bhāṣya* of Asahāya on Nārada cannot be ascertained definitely. But he seems

to have taken great liberties. On p.9. verse 15 (of Nārada) *rājā satpurusah*, etc. the comment is *Manu—Nārada—Visvarūpātmakam*. If the Viśvarūpa mentioned here be identical with the commentator of Yājñavalkya (as is very probable), Asahāya could not have regarded him as of almost the same authority as Manu. Therefore the reference to Viśvarūpa must be due to Kalyānabhaṭṭa. the name of Kalyānabhatta is frequently cited in the commentary itself (*vide* pp. 81, 86, 89). The M. does not most likely refer to the *bhāṣya* of Asahāya on Nārada, but rather to Asahaya's *tikā* on Manu, since the M. quotes Manu., IX. 118 which contains a rule similar to that of Yājñavalkya. From a passage of the Sarasvativilasa (para. 33 of Foulke's edition) it follows that Asahāya wrote a commentary on the *Manusmrti*. This conclusion receives support from the fact that the *Vivādaratnakara* quotes the explanation of Asahya on Manu., IX.182 (*bhrātṛṇām ekajātānām*). The *Haralata* of Anuruddha (who was the gur of Ballāla Sena of Bengal about AD 1168 tell us us that Asahāya composed a *bhāṣya* on the *Dharmasūtra* of Gautama.

Thus it is almost certain that Asahāya wrote *bhāṣyas* on the *Gautamadharmasūtra*, the *Manusmṛti* and the *Nāradasmṛti*. His commentaries on the first two have not yet been traced. It is an irony of fate that the very name of such an important and ancinet commentator should have been forgotten by late writers. The Bālambhatti in explaining the passage from the M. about Asahāya explains 'Asahāya' as an adjective of Medhātithi meaning independent'.

Dr. Jolly (*Tagor Law Lectures*, p.5) thought that Asahāya was earlier than Medhātithi mainly on the ground that both V. and the *Sarasvativilāsa* place him before Medhātithi whenever authorities on topics of *Vyavahāra* are cites. It had escaped the notice of Dr. Jolly that Medhātithi in his comment on Manu, 8.135 (the verse *adarśayitvā tatraiva*) mentions Asahāya by name. The *Sarasvativilāsa* in one place mentions Asahāya after V. (para. 195), though before Medhatithi. It will be seen that Medhatithi flourished about AD 900 or a little later. Medhatithi does not name Visvarupa, though he cites Asahāya by name. Hence Asahāya is older than even Viśvarūpa and is certainly not later than about AD 800.

The views of Asahāya are not so freely quoted by any writer as by the *Sarasvativilāsa*. This shows that in the sixteenth century Asahāya's works were available. We saw above that V. agreed with Asahāya's view about the fourth share to be given to the unmarried sister. Some of the other views attributed to Asahāya may be collected here. The *Sarasvativilāsa* tells us that the definition of *dāya* given by V. was identical with Asahāya's. Asahāya explained the dictum of Uśanas that fields were impartible by taking it to refer to the son of a brāhmaṇa from a ksatriya wife, such a son does not participate in land gifted to a brāhmana. V. on *Yāj.*, II.119) follows this explanation. Asahāya seems to have held that as regards succession tot he sulka of a woman even step-brothers should be given something, though the major portion would go to the full brothers. According to Asahāya the wealth of a childless brāhmana went to the teacher, then to the teacher's son, and then to the teacher's widow and then to the pupil, to the pupil's son, to the pupil's widow and then to the fellow-student. The *Vivādaratnākara* (p. 578) quotes the

Prakāśa as referring to the views of Asahāya and Medhātithi on the verse of Manu (Ix.198) that the special rule of Manu applies to all the *stridhana* belonging to a kṣatriya woman who has a brāhmana co-wife. The M. (on *Yāj.*, II.145) give a smimilar rule.

[After the foregoing was written, the portion of Visvarūp's commentary on the *prāyaścitta* section (recently published) was received. On *Yāj.*, III.263-64 Viśvarūpa mentions Asahāya by name and cites the latter's explanation of a *Sūtra* of Gautama (22.13). This shows that Asahāya commented on the *Gautamadharmasūtra* and flourished before Viśvarūpa, i.e. before AD 800].

Viśvarūpa

The commentary of Viśvarūpa called *Bālakridā* on Yājñavalkya has been published at Trivandrum by Pandit Ganapatiśāstri. M. states in the introuductory verse that the work of Yājñavalkya was expanded by the voluminous (or ample, *vikaṭa*) words of Viśvarūpa. In commentiong on *Yāj.*, I.81 M. tell us that Viśvarūpa understood the words *tasmin yugmāsu sainviset* (in *Yāj..*, I.79) as laying down a *niyama*, while M. takes it to be a *parisamkhyā*. In Viśvarūpa's commentary this discussion occurs on verse 80 (*evam gacchan*), where Viśvarūpa quotes *Manu.* (III.45) and *Gautama*, 5.1 (*ṛtāv upeyāt*), cites the views of some *(kecit)* that Guatama's dictum is a *parisankhyā* and then give his own emphatic opinion that Gautama's words must be explained as containing a *niyama*. M. on *Yāj.* (III.24) informs us that Viśvarūpa, Medhātithi and Dhāreśvara looked upon certain texts of Rsyaśrnga and others on *āśauca* as in conflict with approved *Smṛtis* and deiscarded them.

The printed commentary of Viśvarūpa on the *vyavahāra* section is very meagre and hardly merits the epithet 'voluminous' applied to it by M., which is several times larger than Viśvarūpa's discourse on the same section. But the comment of Viśvarūpa on the *ācarā* portion is truly voluminous as compared with M. on the same section. The style of Viśvarūpa is simple and forcible and resembles that of Śaṅkara. He quotes profusely from the Vedic *Samhitās*, mentions the Carakas and Vājasaneyins on *Yāj.*, I.32 and often supports his position by quotations from the *Ṛgveda* (e.g., on *Yāj.*, II.206), from the *Brāhmanas* (e.g. *Satapatha*, I.8.3.6 on *Yāj.* I.53) and from the *Upaniṣads* (e.g., on II.117 he quotes the well-known *Chāndogya* passage about the ordeal for theft and on I.50 the *Chāndogya* passage II.23.10 about the three branches of *Dharma*). He very frequently quotes the *Gṛhyasūtra* of Paraskara and less frequently that of Bhāradvāja and of Āśvalāyana. He cites a host of writers on *Dharmaśāstra*. It is noteworthy that though he quotes scores of *Sūtras* from the *Dharmasūtras* of Āpastamba, Baudhāyana, Guatama, Vasistha, Sankha, and Harita, he does not quote Viṣṇu anywhere in the section on acara and vyavahara. As Viśvarūpa's is perhaps the earliest extant commentary on a *Dharmaśāstra* work, it is of capital importance in checking the text of the ancient *Dharmasūtras*. Most of the quotations attributed to Svayambhū are found in the extant *Manusmtri*, but the quotations ascribed to Bhrgu are not so found. It is remarkable that most of the quotations from

Bṛhaspati (even on such topics as repayment of debts, sureties, the right of sūdra-*putra*) are in prose, only a few being in verse (e.g., a verse about ordeals on *Yāj.*, II.117, a verse about the method of partition on *Yāj.*, II.153). It appears that Visvarupa had before him not only the prose work of the *Bārhaspatya Arthaśāstra* but also the versified *Smṛti* of Bṛhaspati and that he looked upon both as the compositions of the same author and made no distinction between them. He quotes (on *Yāj.*, I.328) a verse from Viśālāksa. Well-known writer on politics frequently quoted even by Kautilya. On *Yāj.*, I.307 Viśvarūpa refers to the *Arthaśāstra* of Uśanas along with that of Bṛhaspati, Kautilya, the famous author of the *Arthaśāstra*, is nowhere quoted by name. The learned editor of Viśvarūpa's work (in the Trivandrum Series) Thinks (Intro., p.v.) that Viśvarūpa took Bṛahaspati and Viśālāksa as *ārṣa* writers long anterior and therefore well-known to Yājñavalkya and used their *dicta* to supplement and support Yājñavalkya, while he omits Kauṭilya's name because he thought Kauṭilya to be posterior to Yājñavalkya.

This argument is most fallacious from several points of view. In the first place this argument is wrong because Visvarupa quotes verses from Narada and Kātyāyana to supplement Yājñavalkya. No one can in these days regard the *Smrti*s of Nārada and Kātyāyana as anterior to that of Yājñavalkya, nor is there anything to show that Visvarupa reagarded them as anterior. Further it is possible that Kautilya's work was not available to Viśvarūpa. Moreover as Kautilya himself looked upon Bṛhaspati and Viśālāksa as ancient authorities, Viśvarūpa might have naturally quoted from them rather than from Kauṭilya. That Kauṭilya flourished several centuries before Viśvarūpa follows from the express references contained in the works of Kāmandaka, Daṇḍin and Bāṇa. Therefore even granting that Kauṭilya was later than Yājñavalkya it is extremely doubtful whether Viśvarūpa was in possession of the exact chronological position of the two writers. Chronology has never been a strong point with any Indian commentator. Besides the very foundation of the whole argument is shaky as it is based upon premises that are not accepted by many Sanskrit scholars, who place Kauṭilya long before Yājñavalkya. It appears, howevers, that Viśvarūpa impliedly refers to Kauṭilya's work in several places. For example, on *Yāj.*, I.307 he speaks of ministers tested by the four allurements (*upadhā*) of *dharma, artha, kāma* and *bhaya*. This is an echo of Kauṭilya (I. chap. 10). On *Yāj.*, I.344 Viśvarūpa refers to the views of some about marching incase of calamities of neighbouring chiefs, which agree with those of Kautilya. In the comment of *Yāj.*, I.341 Viśvarūpa speaks of the manifold aspects of the work of a minister, some words of which agree very closely with Kauṭilya.

There is a slight discrepancey in the number of verses commented upon by Viśvarūpa and V. for example, on I.194 Viśvarūpa remarks that some read the verse *rathyākardamatoyāni* after it, but that it is redundant. M. comments on this verse. Visvarupa comments on a verse *āgamena visudhena bhogo yāti pramāṇatām* after *Yāj.*, II.28, which is passed over by the *Mitaksara*. This verse is found in the *Nāradasmrti* and is ascribed to him by the *Vyavahāramayūkha* and other digests. There are many various readings sown broadcast over the whole work (vide com. on *Yāj.*, I.1, 2, 51,63, 155; II.119, 179 etc.) Some of these various readings are important. Visvarupa reads *pitā mātāmaho bhrātā* (in *Yāj.*, I.63), while

he notices the reading *pitāmpitā aho*, that is adopted by M. He reads *asvattam lokavidvistam* (in *Yāj.*, I.155) and notices a reading *asvantam*, while M. reads *asvargyam loka*. In several places visvarūpa suggests several meanings of the same verses and phrases (e.g., I.265; II.41, 47, 160, 173). Some of these quotations may be examined here.

(1) The *Dāyabhāga* (p. 145 of the edition of 1829) says that the verse of *Yāj.* (Ii. 149 *aprajastridhanam*) refers, according to Viśva. to *stridhana* acquired at the time of marriage. The words of Visva, on the verse (*brāhmādiviahacatuṣṭaye yat stridhanam*) appear to convey the same view, though not quite clearly.

(2) The *Dāyabhāga* says (p. 188) that Viśva. regarded as exclusive property what was acquired by a man without employing paternal wealth just like dowry at a marriage. Viśva, gives the same rule on *Yāj.*, II.122; but it is to be noted that the last few words in the *Dāyabhāga* which are meant to be a direct quotation from Visva. are not found in the printed text.

(3) The *Dāyabhagā* says (p. 148) that Viśvarūpa's view that the *stridhana* of a childless woman given to her by her parents married in any of the eight forms from *Brāhma* to *Paiśāca* goes to the brother should be accepted. Viśvarūpa (on *Yāj.*, II.148) says that *stridhana* given by a woman's father and other relations, *Sulka* and *Anvādheya* are taken by her brothers if she dies childless and makes no reference to any particular form of marriage. It is for this that the *Viramitrodaya* (p. 704) says that Viśvarūpa and Jimūtavahana held the view that what a woman obtained from her parents when a maiden goes to her brother.

(4) The *Dāyabhagā* (p. 284) says that Viśvarūpa, Jitendriya, Bhojadeva and Govindaraja assigned a place as an heir to the daughter's son after the daughter. Viśvarūpa is commenting upon *Yāj.*, II.138 that the illegitimate son of a śūdra takes the whole estate in the absence of a legitimate son and daughter's and son uses this verse as indicating that among the three higher castes the daughter's son inherits.

(5) The *Dāyabhagā* informs us (p. 296) that Viśvarūpa and Śrikara placed the half-brother after the full brother and before the brother's son.

(6) The *Vyavahārmātṛkā* of Jumūtavāhana (p. 319) says that Viśvarūpa's explanation that ven one person approved of by both sides is a proper witness should be accepted. Viśvarūpa propounds this view on *Yāj.*, II.74.

(7) The *Vyavahārmātṛkā* (p. 334) says that according to Viśvarūpa if the witnesses of a party depose to more or less than what the party asserts in his plaint, then, as the sages declare, it amounts to no proof. Visvarupa holds this view and cites an ancient text to that effect on *Yāj.*, II.81. The *Vyavahāratattva* of Raguhunandana says that Viśvarūpa does not require that the single witness must be *dharmavid*. As a matter of fact that word, though occurring in*Yāj.*, II.74, is passed over by Viśva.

(8) The *Vyavahārmātṛkā* (p. 346) says that the purport of *Yāj.*, II.24 (*paśyato bruvato*) according to Viśva. is simply to censure a man's acquiescence in or indifferent to (respass on his own land) and that the period of twenty years is mentioned in the verse for

precluding the possibility of challenging a document (of sale, etc.) after twenty years. The first of these positions is contained in the printed Viśvarūpa but not the second. It is noteworthy that M. on the same verse introducts the same two positions with the words *atha matam* and disapproves of them, just as Jimūtavāhana does.

(9) The *Smṛticandrikā* (Gharpure's edition, II. p. 294) says that according to the *Sangrahakāra* a widow could succeed to her husband's wealth if she submitted to myoga. that the same was the opinion of Dhāreśvara and that Viśvarūpa has well refuted the view of Dhāreśvara. In the printed Viśvarūpa there is no discussion on this point. But from the fact that Viśvarūpa takes the words *patni* in *Yāj*., II. 139 to mean a widow pregnant at the time of her hasband's death and that Viśvarūpa forbids *niyoga* to brāhmana women, it may be said that he disapproved of the views similar to those of Dhāreśvara.

(10) The *Smṛticandrikā* (II, p. 300) says that the *Saṅgrahakāra* placed the father's mother as an heir after the mother and before the father, that the views of *Saṅ grahakāra* proceeded on the same arguments as those advanced by Dhāreśvara and that Viśvarūpa and others have refuted those arguments. Viśvarūpa places the father after the mother. But there is hardly any argument in the printed text, which does mention the verse of Manu., IX.217 about the *pitāmahī* and which is rather corrupt.

(11) The *Smṛticandrikā* (II, p.266) says that according to Viśvarūpa a special share to the eldest son on partition is not given, now as it is opposed to the usage of *śiṣṭas*, just as nobody offers a big bull or a goat to a learned guest in spite of the ancient texts laying down the offering of a big bull, etc. The opinion here ascribed to Viśvarūpa cannot be found in one place in the printed text, but the following points may be considered. Viśvarūpa on *Yāj*., II.121 distinctly states that *uddhāra* (as laid down in *Manu*., IX.112) can only take place with the consent of all the brothers. On *Yāj*., I.155 he cites the views of some that the word *loka-vidvista* in *Yāj*. implies cow-killing, which is abhorred by all people. He does not approve of this as he says on that interpretation the vidhi about *govadha* would be purposeless. On pp. 25-26 on the printed text he discusses the question of *govadha* prescribed by the Vedic and *Smṛti* texts (such as *Manu*., III.3) in relation to sistacara. But this opinion seems to be the opposite of what is ascribed to him by the *samṛticandrikā*. It is not unlikely that the latter work misunderstands him.

(12) The *Hāralatā* (p. 123) says that Viśvarūpa explained the word *atrivarṣasya* in *Manu*., V.70 as meaning a child that has not completed its third year and that explanation is in conflict with the world *jātadantasya*. On *Yāj*., III.1. Viśvarūpa does quote *Manu*., V.70 and explains *atrivarṣasya* in the way the Haralata points out. The same work (p. 174) declares on the authority of Viśvarūpa, Govindaraja and the Kamadhenu a certain verse as apocryphal.

(13) The *Vyavhāramatṛka* (p. 308) says that Viśvarūpa explained the verse of *Yāj*. (II.17) as applying to a gift and the like. But the printed Viśvarūpa contains no reference to 'gift' in the comment on this verse and seems to take the word *pūrvavādin* as meaning the plaintiff.

(14) The *Smtṛicandrikā* says (II, p. 122) that a certain verse prescribing gradually rising fines for the first, second and subsequent stages of a lawsuit is established by Viśvarūpa to be unauthoritative. This topic cannot be traced in the printed text.

(15) The *Dāyabhāga* tells us (p. 350) that Viśvarūpa declared that if a co-parcener concealed some joint property and it was afterwards discovered, he was not guilty as a thief. A corresponding remark could not be traced in the printed Viśvarūpa. It is to be noted that M. on *Yāj.*, II.126 (*anyonyāpahṛtam*) holds a contrary view.

Later writers frequently quote the views of Viśvarūpa. For example, Kulluka on *Manu.*, II.189, V.68 and other places does so. But considerations of space forbid any further treatment of this matter.

The foregoing examination of quotations from coimparatively early works ascribing certain views to Viśvarūpa establishes that in the main the printed text of the latter is authoritative, though in a few cases there are grounds to hold that it is corrupt or deficient.

In certain cases later commentators were misled into ascribing certain views to Viśvarūpa. For example, the Bālambhaṭṭi often regards the words of M. 'the *ācārya* does not approve of this' as referring to Viśvarūpa, when really the word *ācārya* refers to Yājñavalkya. On *Yāj*, I.68-69 M. cites the views of the *ācāryas* that the verses refers to a girl who is only betrothed and not married. The Bālambhaṭṭi says that Viśva. is referred to. But in the printed Viśvarūpa, this view of the matter is ascribed to others. Similarly on *Yāj.*, II.80, the Bālambhaṭṭi ascribes the words *tad apy ācāryo nānumanyate* to Viśvarūpa. But there is not a word of explanation in Viśvarūpa on this verse. On the verse *patni duhitars caiva*, M. cites the view of some that if the wealth left by the deceased be equal to or less than what is required or maintenance, then the widow takes it in preference to the brothers and if it be more than what is necessary for maintenance, then the brothers take the rest. Then M. says this view also the revered *(bhagavān)* acarya cannot tolerate. Both the Subodhini and Bālambhaṭṭi say that *ācārya* here means Viśvarūpa. Viśvarūpa does not say a word about this view on this verse. The word *ācārya* is applied to Yājñavalkya by Viśvarūpa also (as in his comment on I.2, 9.22, II.136.288).

Viśvarūpa quotes Sabara and the *Ślokavārtika* of Kumarila and therefore he is later than the first half of the eighth century AD. He is referred to as an authority by M. (about the end of the eleventh century), so Viśvarūpa must have flourished between AD 700 and AD 1050. According to the *Smṛticandrikā* (vide Nos. 9 and 10) Viśvarūpa refuted certain views held by Dharesvara. Relying on this Rai Bahadur M.M. Chakravarti (*JASB*, for 1912, p. 345 and *JASB*, for 1915, p. 322) holds that Viśvarūpa is later than Bhojadeva. But this does not seem to be right. It has been shown above that the printed Viśvarūpa contains no express mention of Dhāreśvara and contains hardly any refutation. It is likely that Dhāreśvara adopted certain views that were long current before his time and that later writers knowing only the two works and not their predecessors regarded Viśvarūpa as having criticised Dhāreśvara and not his predecessors. The *Smṛticandrikā* was composed after AD 1200 and it is too much to suppose that it correctly knew the chronological position of the two writers. Later writers often invert the chronological positions of early

predecessors. For example, the *Sarasvativilāsa* often cites the views of M. and then says that Bhāruci and others do not approve of (or tolerate) those views. Similarly in para. 392 it says that on a certain point Dhāreśvara and Devāsvamin follow the views of V. But we know from M. itself that Bhāruci and Dhāreśvara preceded the *Mitākṣarā*. Hence the *Smṛticandrikā* cannot be relied upon as an unimpeachable authority. A greater approximation as to the date of Viśvarūpa can be arrived at by holding Sūreśvara and Viśvarūpa as identical. That they are identical may be regarded as tolerably certain. Eminent writers often connect the well-known works of Sūreśvara, a pupil of the great Śaṅkarācārya, with Viśvarūpacārya. For example, in the *Parāśaramādhava* (Bombay Sanskrit Series, vol. I, part 1, p. 57), a verse from the *Bṛhadāraṇyakopanisad-bhāṣya-vārtika* of Sūreśvara (1.1.97) is ascribed to Viśvarūpa.

In the *Puruṣārthaprabodha* of Brahmānanda Bhārati (Ms. in the Bhau Daji collection, Bombay Asiatic Society) composed in 1476 (probably *Śaka*) the *Naiṣkarmyasiddhi*, a work of Suresvara, is ascribed to Viśvarūpa. Mandanamisra is said to have been a pupil of Sankara. Sankara's traditional date is AD 788-820. Therefore Viśvarūpa *alias* Sūreśvara flourished at the latest about the close of the eighth century AD. It is rather far-fetched though not impossible to suppose that nearly about the same time there were two Viśvarūpas, one the author of *Naiṣkarmyasiddhi* and the other the author of the *Bālakriḍā*. The profound knowledge of the Mimainsa displayed in the *Bālakriḍā* points to the identity of the two authors, but the whole question is further complicated by another circumstance. The learned editor of Viśvarūpa (in the Trivandrum Series), while speaking of the three commentaries on the *Bālakriḍā*, quotes a verse from one of them which identifies Bhavabhuti (the dramatist). Suresa and Viśvarūpa. So Bhavabhuti was regarded as a pupil of Kumārila and he was also called Umbeka. Umbeka wrote a commentary on the *Ślokavārtika* of Kumārila (*vide* the *Yuktisenehaprapūraṇi* on the *Sāstradipika* (first verse), where Umbeka's explanation on the first verse of the *Ślokavārtika* is cited). The *Citsukhi* (p. 265 of the Nirnayasagara edn.) seems to identify both Bhavabhūti and Umbeka and the commentator expressly says so. So the result of this whole tangle would be to hold that the same individal bore five names, Bhavabhūti, Umbeka, Maṇḍanamiśra, Sūreśvara and Viśvarūpa. This is surely more than one can easily believe. It looks probable that there is some mistake here. Both Bhavabhuti and Maṇḍanamiśra were probably the pupils of Kumārila. The first also was called Umbeka and the latter Sūreśvara or Viśvarūpa. Through lapse of time and through their relation to Kumārila confusion was caused.

The M. holds an elaborate discussion on the question whether ownership arises on partition or whether there is partition of what is owned (jointly with others). Viśvarūpa does not contain an elaborate discourse on this topic, but in his introduction to *Yāj*., II.124 he refers to these views and finally gives as his own opinion that there is partition of what is already (jointly) owned.

There are great divergences of views between M. and Viśvarūpa. They are too numerous to be set forth here in detail. A few interesting points of difference are briefly discussed below. It has already been seen that they differ as to the interpretation of *Yāj*., I.78-80.

(1) Viśvarūpa allows the father unrestricted freedom of distribution of ancestral property among his sons during his life-time (on *Yāj.*, II.118 *vibhāgam*, etc., etc.), while M. allows unrestricted freedom only as to self-acquired property.

(2) Viśvarūpa allows a share to the widows of deceased sons and grandsons of a man where a partition takes place in his life-time, while M. restricts the word *patnyaḥ* to the father's own wives when he effects a partition in his life-time. In this one respect Viśvarūpa is more liberal to women than M. In other cases he is not so liberal as V. towards the rights of women.

(3) Viśvarūpa connects the words 'without detriment to parternal estate' with the words 'whatever else is acquired by himself and not with *maitra* (gifts from a friend) and *audvāhika* (gigts on marriage), while M. connects the half verse 'whatever else is acquired by a man himself without detriment to the paternal estate' with *maitra, audvāhika* and two more kinds mentioned in the verse *kramād abhyāgatam*.

(4) Viśvarūpa places the verse *kramād abhyāgatam* after the verse *vibhakte'pi savarṇāyāh* and takes it to mean that if one member of a family recovers with his own exertions after partition ancestral property lost to the family, he has not to give a share of it to the member (his own brother) who is born after partition, when the partition is reopened on account of his birth after partition. M. takes the verse immediately after *pitṛadravyāvirodhena* and as laying down two varieties of self-acquired property. The arrangement of the M. appears better.

(5) Viśvarūpa allows *Niyoga* only to śūdras as a general rule and to ksatriyas in case of danger of extinction of the line (on *Yāj.*, I.69 and II.131), while M. forbids *Niyoga* in general and takes the texts speaking of it as applicable to a girl who is only betrothed and not married.

(6) Viśvarūpa allows one share out ot ten to the son of a śūdra from a brāhmaṇa without restriction of any kind while M. restricts the share to estate other than land acquired by gift.

(7) Viśvarūpa interprets the expression 'half share' with reference to the illegitimate son of a śūdra as meaning 'some portion, not necessarily exact half', while M. interprets it literally.

(8) Viśvarūpa allows a widow to succeed to her deceased husband only if she is pregnant, i.e., he restricts the meaning of the word *patnī*, while M. allows a widow to succeed without any restriction.

(9) Viśvarūpa takes the word *duhitaraḥ* to mean *putrikā* and so does not allow all daughters to succeed, while M. introduces no such qualification.

(10) Viśvarūpa reads *anyodaryasya samsṛṣṭī* for *anyodaryas tu* and *sodaro* for *saṁsṛṣṭo* and his interpretation of *Yāj.*, II.139 is quite different from that of M.

(11) Viśvarūpa reads *ādhivedanikam caiva* for *ādhivedanikadyam ca* of M. and holds that Bandhudatta, *Sulka* and *Anvādheyaka strīdhana* of a childless woman goes on her death

to her full brother; while M. connects the three with the preceding verse as kinds of *strīdhana* and takes the half verse *atītāyām aprajasi* as laying down a general rule of succession to *stridhana* of all kinds, and interprets *bāndhavāḥ* as meaning 'husband and the rest'.

(12) Both differ in the interpretation of the term *anvādheyaka.*

(13) Viśvarūpa takes the verse *adhivainnastriyai* as applicable to a wife superseded without any prescribed ground for supercession; while M. does not introduce any such qualification.

Bhāruci

V. on *Yāj.* (I.81) says that Bhāruci, like Viśvarūpa held that the rule *ṛtau gacchet* was a *niyama* and not a *parisainkhyā.* On *Yāj.*, II.124 M. says that the explanation of the 'fourth share' to be given to unmarried sisters offered by Asahāya and Medhātithi was the proper one and not that of Bhāruci. The *Parāsaramādhavīya* (vol. III, part 2, p. 510) and the *Sarasvatīvilāsa* (para. 133) inform us that Bhāruci was of opinion that umarried sisters were only entitled to a provision for their marriage and that they were not entitled to a fourth share.

Bhāruci being mentioned by the M. is certainly older than AD 1050. Rāmanuja in his *Vedārthasangraha* (reprint form the *Pandit*, edition of 1924, p. 154) mention six *ācāryas* that preceded him as upholders of the *Viśiṣṭādvaita* system, viz. Bodhāyana, Taka, Dramida, Guhadeva, Kapardi and Bhāruci. Similarly the Yatindramatadipika of Srinivasadasa (Anandasrama edn.) enumerates (p. 2) the following teachers as the predecessors of Rāmānuja in propoundig the Visistadvaita system, vix, Vyāsa, Bodhāyana, Guhadeva, Bhāruci, Bramānandin, Dravidārya, Śriparānkuśa, Nāthamuni and Yāmunamuni, Vyāsa is the reputed author of the *Vedāntasūtras*, Dramiḍa (or Draviḍa) is credited with a *bhāṣya* on the *Vedāntasūtras* (which is quoted by Rāmānuja on II.2.3). Nāthamunj preceded Yāmuna. Yāmunācārya was born about AD 916. Rāmānuja refers to him with great reverence as *paramaguru* (*vide Vedārthasamgraha*, p. 149) and is said to have been young when Yāmuna died (*vide JRAS* for 1915, p. 147, and *Ind. Ant*, for 1909, p. 129). It is therefore obvious that the series of writers on the *Viśiṣṭādvaita* is arranged in chronological order by the *Yatindramataīpikā*. Hence Bhāruci must have been a comparatively ancient author on the Visistadvaita, being earlier than even Dramida, Nāthamuni and Yāmuna. He could not have flourished later than the first half of the ninth century. How much earlier he flourished it is impossible to say. It is difficult to believe that there were two different writers of the same name nearly about the same time. Hence Bhāruci the writer on *Dharma* and Bhāruci the *Viśiṣṭādvaita* philosopher must be held to have been identical. If the identity of the two be accepted, then Bharuci the writer on *Dharmaśāstra* becomes comparatively an early writer, being at least as old as (if not older than) Viśvarūpa. It will be seen that he and Viśvarūpa agree on several points (as above on the question of *Niyama* and below Nos. 5, 7, 9) and therefore it is not too much to suppose that the flourished at or about the time when the views found in Viśvarūpa's work were in vogue.

There is one interesting point to be noted about Bhāruci. From numerous notices contained in the *Sarasvativilasa* it appears that Bhāruci either commented upon the *Viṣṇudharmasūtra* or took great pains to incorporate explanations of several *sūtras* of Viṣṇu in his work. For example, para. 637 of the *Sarasvativilāsa* tells us that Bhāruci explained the word *bija* occurring in a *Sūtra* of Viṣṇu as *pinda*. In para. 674 we are told that Bhāruci explained the word *niskarana* in a *Sūtra* of Viṣṇu and that he held that a daughter's son has not to perform the *śrāddhas* of his maternal grandfather if the latter has a son. Sudarāsanācārya in his comment on *Apastamba Gṛhya*, 8.21.2 ascribes the same view to Bhāruci. In para. 681 the Sarasvativilāsa honours bharuci by calling him *Bhagavat* and gives his explanation of a *Sūtra* of Viṣṇu that whoever is authorised to perform the *śrāddhas* of a person and recieves the estate of that person is alone to perform the *śrāddhas* for that person. In para. 711 Bhāruci's explanation of Viṣṇu's *Sūtra* (*samsṛṣṭadhananna patnyabhigāmi*) is given. In para. 719 Bhāruci's remarks on Viṣṇu's *Sūtra (pitṛvyapitṛbhrātṛbhir eva samsargo nānyaiḥ)* are cited. In para. 724 Bhāruci in commenting upon a *Sūtra* of Viṣṇu (*samsṛṣṭinām piṇḍakṛt amśahāri*) is said to have remarked that the capacity to offer *pindas* is the guiding principle in taking the inheritance. In para. 736 Bhāruci is said to have explained the word *bhinnodarāṇām* in a *Sūtra* of Viṣṇu (*bhinnodarāṇām samsṛṣṭno gṛhṇiyuḥ*). Para. 848 gives Bhāruci's explanation of a long *Sūtra* of Viṣṇu about property not liable to partition. There is nothing unnatural in Bhāruci having written a commentary on Viṣṇu. The extant *Viṣṇudharmasūtra* contains doctrines peculiar to the *Visiṣṭādvaita* system, such as the worship of Nārāyana or Vāsudeva, the four *vyūhas* of Vasudeva, etc. If Bhāruci was a *Visistadvaitin* he would naturally turn to the *Viṣṇudharmasūtra* as having the greatest claim on his attention. One remarkable thing is that none of the eight *sūtras* of Viṣṇu cited above occurs in the printed *Viṣṇudharmasūtra*. This leads to the presumption that the printed work is either a mutilated or abridged version of the original *Dharmasūtra*.

There are numerous points on which there is divergence between Bhāruci and V. A few of the more interesting ones are set out below from the *Sarasvativilāsa*.

(1) Bhāruci defined *dāya* as 'that paternal wealth that is liable to partition' and he spoke of *Dravyavibhāga* and *Dharmavibhāga* also. Bharuci did not approve of the definition of *dāya* given by Asahāya and adopted by the M. as *svami-sambandha* is a source of ownership and cannot be the *lakṣaṇa* of ownership (*vide* para. 8.19-20).

(2) Bharuci defined *vibhāga* as separation in connection with one out of the two, vix., *dravya* and *dharma* (religious rites), while the definition of M. would exclude mere *dharmavibhāga* (para. 22-25).

(3) V. explains *Yāj*., II.117 (*mātur duhitarah*, etc.) as laying down that the mother's *stridhana* is first taken by the daughters and in the absence of daughters by the sons of the woman, while Bhāruci explains that in the absence of sons, a woman's *stridhana* is taken by her daughters and in the absence of daughters by the woman's paternal uncle and others. It is to be noted that the M. follows Viśvarūpa, who refers to the view of some that is the same as Bhāruci's.

(4) V. explained the text of Gautama (28.22) as conferring the stridhana of a woman first on her unmarried daughters, then on married daughters, among whom indigent ones were to be preferred to those who were well off. Bhāruci distributed the *stridhana* among unmarried daughters and married but indigent daughters equally.

(5) Bhāruci allowed *Niyoga* in the case of a childless widow, while the M. condemned *Niyoga* in the case of every widow and held that the texts on this matter (such as *Manu.*, IX.59) applied only to a girl betrothed. Thus Bhāruci is nearer to those *Smṛti*s that allowed *Niyoga* to widows than Viśvarūpa who restricts it to śūdra and kṣatriya widows.

(6) Bhāruci explains *Manu*, IX.163 (*eka evaurasah putraḥ pitryasya vasunaḥ prabhuḥ*) as applying to a case where a man having an only son adopts another and as providing for the maintenance of only the *dattaka* and not of others, while M. (on *Yāj.*, II.132) says that the verse of Manu applies only where the *dattaka* and other kinds of sons are inimical of the *aurasa* and where they are devoid of good qualities.

(7) According to M. the word *riktha* should mean *apratibandhadāya* and *samvibhāga* should mean sapratibandhadaya, although in such passages as *Yāj.*, II.51 (*rikthagrāha ṛṇam dāpyah*) the word riktha seems to have been used in the sense of *sapratibandhadāya*. Bhāruci did not make this distinction. It will be noticed that Viśvarūpa also is silent about *sapratibandha* and *apartibandha dāya*.

(8) According to Bhāruci, a fellow student (*sabrahmacārin*) was like a brother and hence if a man dies leaving no fellow student even, then the sons of the fellow student, the widows of the fellow student and the widows of the sons of the fellow student succeeded one after another and in the absence of even all these a *śrotriya* brāhmana took the wealth of the deceased. According to M. in the absence of the fellow student, a srotriya succeeded at once. This shows that Bhāruci was in one respect at least more liberal to women than the M.

(9) On account of the verse of *Yāj.*, II.126 (*anyonyāpahartam*, etc.) Bhāruci thought that if coparceners conceal some joint property there was no offence (of theft), while M. held that there was theft in such a case. It is to be noted that the same view is attributed to Viśvarūpa by the *Dāyabhāga*, though nor traced in the printed next. The M. controverts this view without naming any particular writer.

In many other places the *śarasvativilāsa* refers to the views of Bhāruci (e.g. in paragraphs 13, 69, 276, 316, 501, 752, 761).

Śrīkara

The M. on *Yāj.*, II.135 alludes to the view of Srīkara and others that the widows succeeded as heir to her deceased husband's estate if it was small. M. gives Srikaracarya's explanation of *Yāj.*, II.169 and disapproves of it. It is to be noted that Viśvarūpa also gives two explanations of this verse.

The works of Jimūtavhana, the *Smṛticandrika*, the *Sarasvativilāsa* and the *Viramitrodaya* contain several notices of Srikara's views.

(1) Srikara, according to the *Sarasvativilāsa* (para. 555) held that duhitarah in *Yāj.*, II.135 means putrika and that this view of his agrees with that of Dhāreśvara, Devasvāmin and Devarāta. It has been seen that Visvarupa held the same view.

(2) According to the *Smṛticandrikā* (II, p. 297), the *Sarasvativilāsa* (para, 573) and the *Viramitrodaya* (p. 664) Srikara gave the wealth of a deceased person to his father and mother equally at the same time.

(3) According to the *Dāyabhāga* (p. 220) Srikara preferred the full brother to the half brother on the ground of the superior spiritual benefit conferred by the full brother. Viśvarūpa also did the same as seen above, but it is not clear from his comment whether he did it on the theory of spiritual benefits.

(4) The *Dāyabhāga* (p. 299) very severaly criticizes the arguments and explanations of Śrikara on the verse of *Yāj* (*saṁsrstinas tu*, etc.). Śrikara explained that the general rule was that a re-united coparcener took the estate left by a deceased re-united member and that the words *sodarasya tu sodarah* were an exception to that rule (laying down that an un-reunited full brother was preferred to a re-united half-brother). M. gives a different explanation.

(5) The *Dāyabhāga* (p. 314) says that Śrikara understood the words of *Yāj.*, *anyodaryas tu* as elucidating the words *samsrstinas tu*, etc. It is somewhat remarkable that Visvarupa observes that some read the verse *anyodaryasya samsṛṣṭī* as an elucidation of the previous verse and expains it in the same way as Srikara is said to have done. Viśvarūpa therefore was inclined not to regard the verse as properly authenticated. Our knowledge of the several commentaries on *Yāj.* is so meagre that one is loath to hazard a conjecture. But it looks as if Srikara preceded even Viśvarūpa. It is of course possible that Viśvarūpa may refer to some predecessor whose views were later adopted by Srikara. In many of the views above set forth Srikara either agrees with Viśvarūpa or holds views more antiquated than those of Viśvarūpa.

(6) According to the *Dāyabhāga* Srikara explained a verse of Kātyāyana to mean that among re-united coparceners if one acquired some property by employing common funds then the acquirer got two shares and the rest one share each.

(7) The *Dāyabhāga* states that whatever is acquired as a reward for any *vidyā* becomes the self-acquired property of the acquirer and that Kātyāyana entered into detailed illustrations of gains of learning for dispelling the errors of Śrikara and others. The *Dāyabhāga* does not mean that *Kātyāyana* wrote after Śrikara. The meaning is that *Kātyāyana* wanted to the display such errors as Srikara and others committed later on. The *Dāyabhāga* quotes Srikara's explanation of Kātyāyana above. Srikara seems to have thought that all property acquired in a state of union by any member was liable to partition and that 'acquisition without detriment to paternal estate' was not a proper criterion for judging self-acquisition.

(8) Srikara looked upon wealth obtained by gifts as *vidyādhana* and thus brought about a confusion between wealth obtained by officiating at a sacrifice, teaching and gift. This is very stupid, according to the *Dāyabhāga* (p. 197).

(9) The *Vyavhārmatṛkā* (p. 202) says that in a suit for money (such as 'you owe me a hundred') hundred is said by Śrikara to be the *dharmi* and 'being liable to pay another the sadhya (in the language of the *Nyāya* system) and finds faith with Śrikara (in the true schoolman style) be saying that the *dharmi* (gold and corn, etc.) is liable to destruction by use and so there will result the fault of *āsrayāsiddha*.

(10) The *Vyavahāramatṛkā* (p. 302) thinks that Yogaloka took an example of *karanottara* from Srikara.

(11) Srikara refers to the verse of Nārada (*ṛṇādāna* 237) and says that if the witnesses of a party depose to more or less than what the party asserts, then they are no witnesses and the party is defeated (*Vyavahāramātṛkā*, p. 334). A similar view was held by Viśvarūpa.

(12) The *Vyavahāramātṛkā* (p. 342) gives the explanations of Srikaramisra on *Yāj.*, II.24 which comes of this that enjoyment of land for twenty years by one even without title before the very eyes of the owner and without protest from the latter results in the loss of the ownership of the original owner and constitutes a title in itself and that such verses as 'whoever enjoyes even for many hundred years without title should be punished as a thief (Nārada) refer to cases where the owner is absent. M. appears to refer to this view in its comment on *Yāj.*, II.24.

(13) The *Smṛticandrikā* (II, p. 266) mentions that Srikara said that nobody offers a big bull to a learned guest as there is no such *śiṣṭācāra* now, white Viśvarūpa said that offering of a bull is negatived by *śiṣṭācāra*, which way of stating the matter is improper.

Whether Srikara wrote a commentary on some *Smṛti* or a digest (*nibandha*) it is difficult to say. From the numerous explanations of *Yājnavalkya's* text cited above it appears that he commented on the *Yājnavalkya-Smrti*. But the *Smrticandrika* (II. p. 266) says that Sambhu. Srikara and Devasvāmin compiled together several *Smritis* into digests (and are hence styled *Smṛtisamuccayakāra*). The *Smṛtisara* of Harinātha refers to a *Srikaranibandha* (India Office Catalogue, p. 448, No. 1489). The *Smṛtyarthasara* of Sridhara (Ānandāśrama edition) says that *Smṛtis* being scattered. Śrikantha and Srikarācārya made them into one consistent whole (lit. they filled the gaps in the *Smṛtis*). Therefore it looks as if even though Srikara wrote a commentary it was of the nature of a comprehensive digest.

As Śrikara is cited by M. he is certainly earlier than AD 1050. As his views agree in the main those of Viśvarūpa he is not much later than the latter and if Viśvarūpa be held to be referring to Srikara in his remarks on *Yāj.* (*vide* No. 5 above), then Srikara would be earlier than even the first half of the ninth century. All all events he must be placed somewhere between AD 750 and 1050.

Medhātithi

M. (on *Yāj*.. II. 124) refers to the views of Asahāya and Medhātithi about the fourth share to be given to an unmarried sister and follows it in preference to Bhāruci's.

On *Yāj*., 11.24 M. refers to the fact that Dhāreśvara. Viśvarūpa and Medhātithi did not accept certain texts of Ṛṣyasṛṅga.

Medhātithi wrote a *bhāṣya* on the *Manusmṛti*. It was first Published about forty years ago by Rao Saheb V.N. Mandlik and recently by Mr. Gharpure and it is in course of translation by Mahāmahopādhyaya Dr. Ganganath Jha. Here Mr. Gharpure's edition has been used. The *bhāṣya* as printed is corrupt in many place, particularly in the 8th. 9th and 12th *adhyāyas*. In Mr. Gharpure's edition there is no comment on verses 182-202 of the 9th chapter. In several Mss. of the *bhāṣya* at the end of several chapters there is a verse which says that a king named Madana son of Sahārana brought from other countries copies of Medhātithi's commentary and brought about a restoration (*jirṇoddhāra*). This refers, as Buhler says, not to the restoration of the text of the commentary, but to that of the library of the king, who was Madanapāla, of Kāṣṭhā, son of Sādhāraṇa and flourished in the latter half of the fourteenth century.

Bühler in his learned and exhaustive introduction to the *Manusmṛti* (SBE. Vol. 25) brings together a good deal of information about Medhātithi (pp. CXVIII-CXXVI). No useful purpose will be served by repeating what he has already seated. In the following lines a concise statement of the results of his study will be given and some details will be added which were not noticed by that learned scholar.

Bühler is not quite accurate when he states (p. cxx. footnote 1) 'though the opinions of 'others' are mentioned very frequently and though sometimes those of three or four predecessors are contrasted. Medhātithi gives only once the name of an early commentator." Medhatithi does mention by name several predecessors. On *Manu*., VIII. 3 Medhatithi refers to other interpretations offered by Bhartryajna and asks his readers to refer to the work of that author. On VIII 151 he quotes the differing explantion of Yajvan and on VIII 156 he again mentions Yajvan by name. Yajvan is probably only the later half of some time (like DevarajaYajvan). On VIII 156 he mentions by name Asahāya. In his somewhat lengthy comment on VIII. 152 Medhātithi twice quotes the explanations of a writer by name Rju. Bühler is unable to make out anything of the corrupt word preceding Visnusvamin in Medhāthithi's comment on *Manu*. IX. 253. Some Mss. read it as *kāvara*, others as *kovara*. If a conjecture may be hazarded that word is probably kavera (i.e., residing on the Kāveri river). From the quotation it appears that Viṣṇusvāmin is not a commentator on *Manu* but rather a writer on the *Purva mimamsa*. Medhātithi quotes an Upādhyaya (on IX. 141 and 147 as Bühler holds that Medhātithi means his own teacher. It seems more likely that Upādhyaya is the name (or rather part of a name) of some previous commentator and does not mean his teacher.

Bühler rightly holds (against the views of Dr. Jolly) that Medhātithi was a man from the North, probably from Kashmir, as he introduces the country of Kashmir in explaining

svarāstre, janapadah (in *Manu.* VII 32 and VIII. 41), in giving the monopoly of the sale of saffron as a privilege of the king of Kashmir in repeatedly reterring to the Kathaka Sakha and in saying that the rainbow is called *vijnana-cchāyā* in Kashmir (on *Manu.*.IV.59). He very often refers to the northerners. e.g., he says, on *Manu.*, III. 234, that *kutapa* is the name of what is well-known as *kambala* among the northern people and on III. 238 he says northern people wrap their head with *śatakas* (garments). He also says on *Manu.*, 11.24 that in the Himalayas in Kashmir it is not possible to perform the daily *sandhya* in the open nor a bath in the river in *hemanta* and *sisira.* On III. 18 he says. In other countries, some says, people marry one's maternal uncle's daughter and hence the words of Manu in III. 18, but Medhātithi declares it to be opposed to Gautama (4.3 and 5) and proceeds 'even in that country taking food in the same plate with (or in company of) one whose thread ceremony is not performed is not at all regarded as *dharma.* This is clearly a reference in the *Sūtra* of Baudhayana (1.1.19) according to whom taking food in the same plate with those whose *upanayana* is not performed and marrying *mātulasutā* are two of the five usages peculiar to the South. It is to be noted, however, that later writers like Kamalākara (in his *Nirṇayasindhi*, 3rd *Pariccheda* on *Sapiṇḍya*) regard Medhātithi as a southerner.

He refers to his own work called *Smertivivka* (on 11.6 and X.5), which seems to have been a work in verse or contained numerous verses. In the *Parāśaramādhaviya* (vol. 1. part 2, pp. 183-86) there is a long quotation in verse from a work called *Smrti*viveka and there are several verses attributed to Medhātithi in the work (vide Vol. 1, part 1, p. 276 and part 2. 172). A certain writer called Lollata (on *sraddha*) frequently quotes verses of Medhātithi.

He seems to have been a profound student of the *Pūrvamimāmsā.* His comment is full of the terms *vidhi* and *arthavada.* He quotes Jaimin's sūtras frequently and applies them to the interpretation of *Smrti* texts at every step. To take only a few examples at random, n Manu,.VIII. 100 he construes the *Sūtra* of Jaimini (VI.7.3) forbidding the gift of land in the Visvajit as referring to the whole of the earth. On *Manu.*, 11. 107 he refers to the *Sūtra* of Jaimini (IV. 3.5) and to the *rātrisattra-nyāya* (IV. 3.17-19). On *Manu.*, 1.84 he says that *samvatsara* means 'a day' in a long *sattra* (for which *vide* Jaimini. VI. 7.31-40). On 11.23 he refers to *vidhivannigadādhikarana* (1.2. 19-20). On II. 29 he speaks of the *sarvaśākhāpratyaya-nyāya* (Jaimini. II. 4. 8-32) and applies it to Smritis. On the same verse he refers to the *grahikatva-hyāya* (Jaimini. III. 1. 13-15).

He quotes on *Manu.*, 1.19 a verse from *Sānkhuakārikā* (*prakrter mahān*, etc.) He refers to Vindhyavāsa (on *Manu*, 155), as a Sankhya, says that he does not admit a subtle interim body (*antarābhavadeha*) and explains the latter. This is probaly takes from Kumārila's words. He repeatedly refers to the *Purāṇas* and on III. 232 tells us that they were composed by Vyāsa and contained accounts of creation. etc. He refers to Bṛhaspati as a writer on *Vārtā* (on *Manu.*, VII. 43 and IX. 326) and on VIII. 285 refers to the works of Bṛhaspati and Uśanas on politics and government. Usanas is also mentioned in the comment on *Manu.* VIII. 50. On *Manu.*, VII. 43 he refers to Cāṇakya as a writer on *Daṇḍaniti.* In

numerous places he seems to have drawn upon Kautilya's work. For example, on *Manu.*, VII.54 he mentions the testing of minsters by Upadhas. On *Manu.*, VII. 155 in interpreting *pañcavarga* as *kāpaṭika, udāsthita, gṛhapatika, vaidehika* and *tāpasavyañjana* he explains these terms almost in the words of Kauṭilya (I. chap. 2). Vide also the quotations on *Manu.*, VII. 61. 81. 78 and 148.

Bühler at first took the remark (on *Manu.*, XII. 19) about Śariraka as referring to *Śankara's bhāṣya* on the *Vedāntasūtra*, but later on changed his opinion (SBE. Vol. 25, p. cxxii) and held that it probably implies a reference to the *Śariraka sūtras*. Buhler does not seem to be right. The words *yatheha-rājā. . . apaiti* are a summary of Śaṅkara's *bhāṣya* on *Vedantasutra*, II. 1. 34 and II. 3. 43. In another place (on *Manu.*, 11.83) Medhatithi refer to the *Upanisadbhāṣya* on *Chāndogya*. II. 23. 4 and tells us that the Upanisad passage has been differently explained in the bhasya. Sankara does explain that passage differently. But this is not all. In various other places Medhātithi appears to be referring to the bhasya of Sankara on the *Vedāntasūtras*. In his comment on *Manu.*, 1.7 he gives several theories and places the *Advaitadarśana* as the last and refers to the *vivartavada* and the well-known example of the sea and its waves. On 1.80 he appears to refer to Śaṅkara's *bhāsya* on the *Sutra — lokavat tu lilakaivalyam* (*Vedāntasūtra*. II. 1. 33). He, however, seems to have favoured the position that the attainment of highest *brahma* called moksa is due not to mere correct knowledge, but to the combination (*samuccaya*) of knowledge and *karma* (*vide* his remarks on *Manu.*, XII. 87. 90 and VI. 32. 74-75).

He gives at least thre interpretations of the verse of *Yāj*, about twenty years possession (II. 24) more of which agree exactly with that of Viśvarūpa. His work is a mine of information on all sorts of topics, but considerations of space forbid any further pursuit of this matter.

As Medhātithi quotes Kumārila and also refers to Śaṅkara and as M. looks upon him as a writer of established reputation Medhātithi is later than AD 825 and earlier than AD 1000 and probably flourished between AD 825 and 900. This conclusion is somewhat strengthened by the fact that though he names Asahāya, he does not refer to Viśvarūpa or Bhāruci or Srikara and therefore could not have flourished much later than Viśvarūpa. If by Misra in his comment on *Manu.*, XII. 118 he refers to Vācaspatimiśra, author of the *Bhāmati* and other works, then his date will be somewhere after AD 850.

Dhāreśvara

M. says (on *Yāj.*, II. 135) that Dharesvara tries to reconcile the conflicting texts about the right of the widow to succeed to the estate of her deceased husband by saying that she succeeds if her sonless husband was separate and if she is willing to submit to *Niyoga*. M. on the same verse says that Dhāreśvara relying on *Manu.*, 9.217 placed the paternal grandmother immediately after the mother and before the father. On *Yāj*. III. 24 M. says that certain texts of Ṛṣyaśṛṅga and others about impurity on death were not accepted as authoritative by Dhāreśvara. Viśvarūpa and Medhātithi. The *Smrti*candrika (II. p. 294)

quotes a verse from the Sangrahakara which asserts the same views about the widow's rights as those of Dhāreśvara and says that the position of Dharesvara was controverted by Viśvarūpa. The *Sarasvativilasa* (para. 576 and 593) says just as M. does, that Dhāreśvara preferred the paternal grandmother to the father. The *Hāralatā* (p. 117) makes the remark (similar to that of M. on *Yāj.*, 11.24) that Bhojadeva, Viśvarūpa. Govindarāja and the Kāmadhenu did not cite certain texts as Jātūkarna's and that therefore the latter were not authoritative.

That Dhāreśvara is to be identified with Bhojadeva of Dhārā, perhaps the most famous Indian prince as a patron of learned men, follows from several considerations. The *Dāyabhāga* cites Bhojadeva and Dhāreśvara without making any distinction between the two. Some views that are ascribed in one work to Dhāreśvara are ascribed to Bhojadeva by another. The *Vivādatandava* of *Kamalākara* ascribes to Bhojadeva the same views as to the widow's rights that are ascribed to Dhāreśvara by M. Besides, works on numerous branches of knowledge were composed by (or in the name of) Bhoja, king of Dhārā. Mss.of the Rājamārtanda (commentary on the *Yogasutra*) have colohons saying that the work was composed by Dhāreśvara Bhojarāja. The introductory fourth verse of that work says that Bhoja composed (beside that work) a work on grammar and on Vaidyaka. He wrote an astronmical work (called *Rājamrgānka*) and two works on poetics, the *Sarasvatikaṇṭhābharaṇa* and the *Sṛngāraprakāsa*.

Vaidkyanātha Dikiṣita

Vaidyanātha Dikṣita, the celebrated author of the digest entitled 'Smṛtimuktāphalam' appears to have been completely neglected in the History of Dharma-Sāstra by MM. Dr. P.V. Kane. This is possibly due to the fact that at the time when the first volume of the History of Dharma-Sastra was published in the year 1930, the digest 'Smṛtimuktāphalam' was not at all published in the printed form.

Prof. Kuppuswami Sastri of Madras in his review on the History of Dharma-Sastra Vol.I pointed out that MM. Kane has ignored Vaidyanātha Dikṣita, the author of the Smṛtimuktāphalam and Vaidika Sarvadbhauma— the southern writers on Dharma-Sastra.

Inspite of this review at the hands of a competent author, Dr. Kane did not write a chapter on the digest "Smṛtimuktāphalam, particularly when he brought out the revised and enlarged edition of the History of Dharma-Sāstra Vol. I into two parts. This might have happened on account of the old age of Dr. Kane or he might not have thought if fit to incorporate this author in his magnum opus. Hence an attempt is made in this chapter to throw some light on this neglected author in the History of Dharma-Sāstra Vol.I parts I and II.

It may be remarked at the very outset that Dr. Kane has not totally neglected this author Vaidyanātha Dikṣita in all his volumes of History of Dharma-Sāstra. In fact, in the History of Dharma-Sastra Vols. II and IV he has made some incidental references to

this digest work. But these references can not be treated as adequate and complete so as to do him justice in the development of the History of Dharma-Sāstra.

The voluminous digest is published in different parts by J.R. Gharpure. The first part dealing with the Varṇāśramadharma is published in the year 1937. The Second part discusses the Āhnika section of the Dahrma-Sastra and is published in the years 1938. The third part expounding the Āsauca sections published in the year 1939. The fourth part dealing with the Śrāddha aspect is published in the year 1940. The fifth and sixth parts explaining the Kāla-Kāṇda and Prayascitta Kāṇḍa are published in the year 1940. In all, these six volumes cover 944 printed pages. At the end, the list of the *Smṛti* works, commentaries and digest works quoted by the author of the Smṛtimuktaphalam is given by the editor.

It may be pointed out here that some other parts of this voluminous digest have not, so far, seen the light of the day. Dr. Kane in his History of Dharma-Sāstra Vol. I Part II on page 1133 remarks that this author has also written on the Saṁskara section of the Dharma-Sāstra. He further adds on page 1045 that Vaidyanātha also seems to have written on the Dāyabhāga aspect of Dharma-Sāstra. Dr. Kane also has not mentioned the places where the manuscripts of these other parts are available and deposited. Hence we have to mainly depend upon the parts which are published so far from getting a correct picture about the position of our author in the domain of Dharma-Sāstra literature.

As regard the personal history of Vaidyanatha Diksita, we are not fortunate enough to have any detailed account. The introductory verses of his works—Sraddha Kanda p. 549 and the Prāyaścitta Kanda p. 859 inform us that he was born in the race of Vādhūla. He was a devotee of Rama, since in his two works, particularly mentioned above, he has shown his unflinching devotion towards his favourite deity. Besides, the above information, no definite source is available to us for the details in respect of his family.

The author of the Smṛtimuktāphalam has quoted very profusely the Smrti dicta available to him. He has also quoted Haradatta on the Āpastamba Dharam-Sūtra and Gautama Dharma-Sūtra Devaṇṇabhaṭṭa, Sudarśanācārya, Parasara-Mādhava and Sāyaṇa. The special feature of his works is that he has quoted many Upanisadic works like Amrtabindu-Upanisad pp. 193,195, Vasudeo Upanisad p. 292, Cakro-panisad p. 299, Paramahamsopanisad, Śiksopanisad p. 73, Subalopanisad p. 195. Most of these Upanisads are known to us by name and these have no place in the collection of 108 Upanisads published by the Nirnaya Sagar Press, Bombay. Perhaps some of these will have good scope in the Upanisads of Yoga.

The importance of this digest can also be emphasised from an altogether different angle. Our author has quoted Sāyaṇa, the celebrated commentator of the Rg-Veda under the heading 'Sayaniyam or Sudhanidhi p. 699 or Smṛtisāra-Sudhānidhi p. 583. If, however, the places where Sāyaniyam is written, are examined, then one comes to know that the verses mostly are pertaining to the Sraddha aspect of Dharma-Sāstra. Dr. Kane in his History of Dharma-Sāstra Vol.I Part II p. 1145 remarks that in the Nirnaya-Sindu Kamalakarabhatta quotes from the work of Sāyana. These are probably references to the

Prāyaścitta Sudhānidhi. Even Dr. K. Krishnamoorthy has pointed out in his critical edition of the Subhāsita Sudhanidhi on page 14 that Sāyana appears to have written Prāyaścitta Sudhānidhi. Even though these remarks of the above mentioned two scholars are correct, yet it is possible to disagree with them on the point that Prāyaścitta Sudhānidhi is the work on Dharma-Sāstra from the pen of Sāyaṇa. In fact, a reference to the work Smṛti-Sāra Sudhānidhi and the verses quoted as Sāyaṇa's under the heading Sāyaṇiyam on pp. 753, 717, 466, 665, 695,807, 775, 684, etc. clearly indicate that these verses have bearing on the Śraddha aspect of Dharma-Śāstra. Hence, it would be more correct to state that Sayana has also written another work '*Smrti*-Sara-Sudhanidhi' from which the verses dealing with the Sraddha aspect of Dharma-Śāstra might have been quoted by our author. If this is correct, then it would throw new light on the work of Sayana i.e. Smṛti-Sara-Sudhanidhi. A study then of this new work of Sāyana would be a further area of research.

The special importance of the digest can also be emphasised from still another another angle. Vaidyanātha Dikṣita has profusely quoted from Varadarājiya on pages 99, 327, 524, 622, 614, 492, 128, 129 and 494. The History of Dharma-Sastra Vol I Part II informs us Varadaraja as the author of Vyavahara Nirṇaya, which is published by Adyar Library and Research Centre, Madras. Now if we closely examine the contents of the verses quoted from Varadarājiya it becomes quite clear that these verses pertain to the aspect of Dharma-Sāstra other than the Vyavahara section. Now the question arises whether the Dharma-Sāstra literature knows any other writer on Dharma-Sastra who is different from the author of the Vyavahāra-Nirṇaya. This itself can become a further topic for research.

The utility of this digest is also supreme in fixing the date of Govindaswāmi, the commentator of the Baudhāyana Dharma-Sūtra. Both Dr. Buhler and MM. Dr. Kane are not sure about the date of Govindaswāmi. Dr. Bühler treats him to be a modern commentator. Dr. Kane regards him as a very late writer. In short, both these scholars have not expressed any decisive opinion of their own on the date of Govindaswāmi. The present author has pointed out in his article on 'Date of Govindaswāmi' that Govindaswāmi is to be placed between 1650 and 1690 since he is quoted by Vaidyanatha Diksita, the author of the Smṛtimuktāphalam. Mr. P.K. Gode has placed Vaidyanātha Dikṣita, the author of this digest after 1686 A.D.

Dr. Kane has shown the importance of this digest particularly in the southern part of India. The Smārta Brāhmanas of Madras follow the Smṛtimuktāphalm of Vaidyanātha Dikṣita as a manual of Sraddha.

From the digest Smṛtimuktāphalam, one gathers the impression that this digest to be a pedestrian performance, since its importance lies only in quoting the *Smrti* dicta available to the authore. From the point of view of interpretation, however, Vaidyanatha Dikṣita has not anything significant to contribute. He also has not contributed any new light to the development of the Dharma-Sāstra thought as is the case with Vijñānesvara, Kamalākarabhaṭṭa, Nilakaṇṭha and others.

In the domain of the application of the Pūrva-Mimāmsā doctrines to the Dharma-Sāstra, our author is of meagre use. He has, for instance, employed Paryudāsa pp. 275, 709, 846, Vikalpa pp. 683, 737, Chatrinyāya p. 711, Apurvamante syāt p. 579, Sarvasākhāpratyaya nyāya p. 57, pratinidhinyāya p. 26, Virodhādhikaraṇa nyāya p. 7, Apūrva Vidhi p. 27, Parisamkhyā p. 27, Punarvacana p. 27, Vyavasthia Vikalpa p. 816, Upalkṣaṇa p. 277. It is worthwhile to point out that he has quoted Jaimini at few places. e.g. pp. 167, 301, 398, 506, 844 etc. If all these places are properly examined, then one would come to the pointed conclusion that he has mostly quoted the *Smrti* of Jaimini and it is only at one place, that he has quoted Jaimin's Purva-Mimāmsā Sūtra.

It should be noted that our author has completely disappointed his readers on the point of the interpretation of the Kṛṣṇāṣṭami Vrata and Jayanti. This is an important place of the Dharma-Sāstra where any curious reader would have hoped to find some interesting Mimāmsā observations. But our author passes over such places in silence. The attention of the serious readers may be drawn to the History of Dharma-Sāstra of MM. Dr. Kane for the Mimamsa discussion on this aspect.

Though it is an admitted fact that our author has no originality to claim in the matter of interpretation, yet it must be shown that at some places, he does not seem to be a servile imitator of his predecessors. He has shown his boldness in showing disagreement with Vijnanesvara, the accredited master of Purva-Mimamsa. At another place, however, Vaidyanatha Diksita clearly points out that if the interpretation offered by Vijnanesvara is accepted, then it would come in direct conflict with the Smṛti text. Hence on the basis of the textual authority, he has rejected outrightly the opinion of Vijnanesvara. Incidentally, it must be mentioned here that on some debatable points, Diksita gives expression to the diametrically opposed views of the writers on Dharma-Sastra, but fails to give his considered opinion in that respect. For the clarifications of this point, the attention of the readers may be drawn to the Smṛtimuktaphalam pp. 659-660. Here he quotes in details vijñānesvara's discussion in the Mitakṣarā on the Yājñavalkya-Smṛti particularly on the Pārvaṇa and Ekoddiṣta modes of Srāddha. After this lengthy discussion, he also refers to the view points of other writers on Dharma-Sāstra with the expression 'ity eke or ity anyaiḥ' and aparaiḥ. It is rather surprising that our author does not give us his casting opinion in favour of any of the views quoted.

The importance of this digest can also be stressed from one more angle. For the development of the concept of Atideśa, our author Dikṣita has quoted a verse on the name of Vyāghra, which clearly indicated that in the case of Atidesa, only half of the details are to be transferred. It must be mentioned here in this very context that Nilakantha who has introduced the three varieties of Atideśa has not at all made any use of this verse of Vyāghara which is particularly quoted by Vaidyanatha Dikṣita. The attention of the serious readers may be drawn to some of my papers indicating the utility of this digest work.. I prefer to indicate the points in the foot-note.

As regards the date of Vaidyanātha Dikṣita, it may be stated that the external evidence shows that he is, not at all, quoted either by Kamalākarabhaṭṭa (1612 A.D.) and

Nilakaṇṭhabhaṭṭa in his digest known as Mayūkhas. Nilakaṇṭha is placed by Dr. Kane in 1600 to 1660 A.D. So far as, the internal evidence is concerned, Diksita has quoted Haradatta (1150 A.D. to 1300 A.D.), Parāśara-Mādhava (1330 to 1385 A.D.), Sāyaṇācārya (1316 A.D to 1387 A.D.). This seems to confer our conjecture that he has flourished after 14th century A.D. As he is not quoted by the other well-known authorities on Dharma-Sāstra like Kamalākarabhaṭṭa, Nilakaṇṭha etc. he must have flourished after 1660 A.D. MM. Dr. Kane holds that he seems to have flourished some time about or after 1700 A.D. Mr. P.K. Gode has settled this problem of his date by placing him after 1686 A.D. Hence it is not necessary to discuss this point at any length as such.

The foregoing discussion helps us to conclude that the importrance of this digest lies in different angles stated above. It would not be out of place, if it is casually remarked that this author deserves to be studied in details by the future band of scholars. Any way, it would be more correct to state that though for the science of interpretation Dīkṣita has nothing to contribute, however, the stanza quoted by him on the name of Vyāghra assumes supreme importance for understanding the evolutionary aspect of Atideśa.

VIṢA-DIVYA (The Poison Ordeal)

Agni, Jala and Viṣa are the powerful ordeals. Agni and Jala, the deified objects of nature form the base in the first two ordeals. These are, obviously, the primitive ordeals. According to the Indian System, Visa comes next to these ordeals. The poison recommended for the purpose is derived from a Sṛṅgī plant. It is thus an ordeal based on the object derived from nature.

The Poison ordeal is supposed to be the most powerful ordeal. Considered from the cost point of view, we find that it is recommended for the highest offence. Nār, particularly points out that it must be tried for very serious charges. The very serious charges as explained by NMS Bhāṣya mean the charges deserving death-punishment.

The Poison ordeal was particularly recommended for the Śūdras. The Kṣatriyas and the Vaiśyas could opt for it. It was never advised for a Brahmin (vide f.n. 123).

The Poison ordeal is essentially meant for the strong and stout person only. It was never to be given to the children, the old persons and the persons suffering from various diseases. It was prohibited to a woman. It was particularly denied to the persons suffering from Pitta (Bile) and Ślesma (Phlegma), obviously because, it has a very strong and quick reaction on the persons having these constitutions. Similarly, it was prohibited for a leper.

The poison was prohibited for the persons knowing Mantra and Yoga (because they could nullify the effects of poison.).

In making these prohibitions, we find that, the Dh. writers have taken into consideration the Āyurvedic functioning of the poison and have taken all precautions in recommending the ordeal. The poison ordeal is a test, a means of proof, to detect the charges made against

the person. The Dh. writers have, therefore, seen that the person is not allowed to die on that account. This will be clear from the following discussion. As regards to the above prohibitions, we find Susruta pointing out that the poison in general flares up disorders in the body-constitution. It gets intensified in its effects when given in hot weather or in the rainy season, to the persons suffering indigestion, bile, heat, various others diseases particularly those suffering from urinary diseases, as also in the cases of the children, pregnant women, old persons, the weak and the timid. The poison reacts more on the persons having skin diseases. Dh. writers have recommended the Sṛṅgi variety of the poison. Dr. V.G. Desai in his 'The Materia Medica and Therapeutics of Indian medicinal plants' points out that his poison is particularly having elements harmful to the skin. Thus, we find that the Dh. writers have thoughtfully prohibited this ordeal for the persons suffering from Bile, Phlegma and other diseases and for children, women, old persons, the weak and the timid.

Viṣṇu says that the Poison ordeal should not be tried in the Prāvṛṭ or the rainy season. Nār. also makes a similar statement restricting the use of the Poison ordeal in the rainy season. Nār. however, appears to be against recommending this ordeal simply on the basis of the seasons, what is important according to him is the weather and the quantity in which the poison is given. Thus according to him, the poison ordeal should essentially be tried in the cold weather. The Poison could be given upto 4 Yavas in Varṣā, 5 Yavas in the Grīṣma, 7 or 8 Yavas in Hemanta and a little less (i.e. 6 Yavas according to Mit.) in the Śarad. Hemanta here includes Sisira also as it is pointed out by Mit. In the Vasanta also, the poison of 7 Yavas, quantity can be given, since, Vasanta is, in general, a season recommended for all the ordeals.

Pit. recommends Hemanta and Siśira as the two seasons fit for employing the poison ordeal. The only reason for prohibiting the poison in the rainy season is that it gets inconsistent in its effects in the rainy season.

It will appear that the restrictions thus made by the Dh. weiters find a sympathetic support from the Āyurveda works also. Vāgbhaṭa, for example, says that because of the humidity in the rainy season, the poison spreads fast like damp jaggery. We have already seen that it works intensely in the hot weather. That is why these writers insist that the poison must be given in the cold weather, preferably when there is snow.

Pit. states that the poison should be given in the last watch of night. It could not be given in the noon, afternoon or in the evening, points out Nār.

According to Nār., the poison ordeal is particulary conducted in the vicinity of the Brahmins. Lord Śiva is worshipped as a special deity in the trail by poison. (This is, obviously, because of the drinking of poison by Lord Śiva at the time of the churning of the ocean.). It is quite possible that the poison ordeal must have been conducted in Śiva's temple. Later on, we find Prajāpati recommending Śiva's temple as a regular place for all the ordeals in general. It must, however, be noted that vicinity of Lord Siva has a special significance in the case of the poison ordeal.

PROCEDURE:

VIṢṆU:

Now, the poison ordeal. Not each and every variety of poison can be used for the trial but only one derived from Śṛṅga plant grown on the Himalayas. Seven Yavas of this poison mixed with ghee can be given to the accused person and if he is able to digest it with comfort, without any reaction as such, he should be declared innocent and be relieved at the end of the day. (The following mantra may be addressed) "Oh Visa, since you are dreadfully poisonous, you are terrific for al the beings. Only you know the things that are not known to men. This person convicted under law wants to get himself acquitted. It will therefore, be proper for you to protect him from doubt, according to Dharma."

YAJÑAVALKYA:

" Oh Viṣa! You are the son of Brahmā, firm in the duty of (deciding) the truth. Save me from this accusation and be like nector to me by truth (If I be innocent)". Having said this, the person should eat the poison of the Sṛṅgī plant grown on Himalayas and if he digests it without any reaction, he should be declared innocent.

NĀRADA:

I will now speak of the best procedure of the poison ordeal—the time when and the way in which it has been recommended. The knowers of truth by Dharma advise to give poison in the Sarad season, when there is snow, having measured it in the Yavas. The knowers of Dharmas may not give it in the noon or afternoon nor in the evening and may avoid śarad, grisma, vasanta and Varṣā for practising it. The spoiled (Bhagna), distilled or processed (Cārita) heated or perfumed (Dhūpita) and mixed (Miśrita) poison may not be used. Similarly, the Kalakuta and the Alābu poisons must be avoided. Only the fresh Sārnga poison having colour, flavour and juice in it, procured from the Himalayas (must be used). It must be original and well-preserved and should not be affected by mantras. Unspoiled as such, it must be given to a person born of a Kṣatriya, Vaiśya or a Sūdra caste. The poison mixed with ghee may be given in the qunantity lesser by 1/8th part of the 6th of the 20th part of one Pala poison. (The Mantra to be recited should be-) "Oh Visa! you are the son of Brahmā, firm in the duties of deciding the truth. Purify this person from the evils and be like nector for him according to the truth". The person must be protected and kept under shade for the rest of the day, without allowing him to take meals. If he overcomes the reaction or the fatigue of the poison, he is pure.

Having worshipped Mahesvara by offering incense, presents and mantras, (Prādvivaka) who has observed fast, should give poison to the person in the vicinity of gods and

brahmins. The Brahmin with a composed mind, facing east or north, should give poison to the person, who facing south, is in the company of the Brahmins.

KĀTYĀYANA:

The poison derived from the Śṛngi plant is dark like Ajāśṛṅga. When cut, it appears yellow like ginger (Śṛṅgavera). This is known the Śṛṅgī poison. Dropped in blood, it immediately clots it and turns it black. This is the confirmatory test, known by the exports of the ordeals, for testing the genuine Śṛṅgī poison.

The Vatsanābha poison is yellow and can be known by its colour. When cut, it appears like counch or the mother or pearls. It must be purified immediately with milk and honey. These are the external signs of confirming this poison described by those who practise Dharma. The poison must be given in the former part of the day and in a cool place, after having rubbed it smooth with thirty times of ghee. (The Prāḍvivāka) should give to Śodhya the poison less by 1/8th from the 20th part of a Pala poison, mixed with ghee.

BṚHASPATI

He who digests the poison given in due procedure without using any mantra or medicine as an antidote, should be known as innocent, otherwise, he should be punished or asked to pay fine.

PITĀMAHA

I would now speak of the procedure of poison with its recommended specification which should be given to the accused person exactly in the recommended quantity. In order to purify a person without any doubt, only seven Yavas of the Śṛṅgī or the Vatsanābha poison available in Himalayas should be used. Processed, old, artificial and Bhūmija poisons should be avoided. The poison to be given must be taken in hand and addressed as follows. 'Oh! Viṣa ! You are created by Brahmā for examining the wicked persons. Show yourself to the sinful one and be nector for the innocent persons. Oh Viṣa ! the Death Incarnate! you are properly created (Parinirmitam) by Brahman. Protect this person from sin and be nector for him by truth'. The king should keep the person undergoing the ordeal under the watch of his own persons for three or five nights, just to confirm that no deceipt (kuhaka) has been resorted to. An examination of the person should be conducted to know whether medicines, incantations or precious stones that are antidotes are secretly employed by him in his body. After taking the poison, if the person does not swoon or vomit and remains hale and heartly he must be declared innocent at the end of the day.

The procedure of the poison ordeal is very simple. After observing fast, the Prāḍvivāka should worship lord Siva, place the poison before him, conduct general rites (i.e. beginning with the invocation of Dharma and ending in tying of the Sirahpatra), address

the poison with proper mantras, give it to the person and watch the results. The important points are (i) taking poison recommended (ii) watching the results. (iii) mantras to be used (iv) signs of the success or the failure of the trial.

(i) The Poison recommended:

Dh. writers have recommended a standard variety and perhaps only one variety i.e. the Śārṅga poison, the poison derived from the Śṛṅgī plant available in the Himalayas.

The earlier writers have described only Śārṅga poison. Kat. and Pit. have, however, described the Vatsanābha variety also.

As regards to these varieties, Dr. Kane observes that 'The poison to be selected is Śārṅga (derived from the Śṛnga plant) or Vatsanābha (aconite) or Haimavata. Pit. (quoted by Aparārka) treats the three as distinct, while Yāj. II. 111 appears to prescribe Sarnga growing on Himalayas as the poison to be selected.'

But the word 'Himajasya' meaning 'grown on Himalayas' in the Pit. stanza, obviously, qualifies the poison described. So, we get only two varieties the Śārṅga and the Vatsanābha.

Dr. V. G. Desai who has identified the Indian medicinal plants, describes Vatsanābha (Aconite) as a group of herbs. The Śṛngī plant (Aconite forex) is described by him as a species of the Vatsanābha group. The Vatsanābha group is available in the Himalayan range and the Śṛngī plant which happens to be a dreadful poison is particularly available in Nepal.

It cannot be said definitely whether the old writers were knowing Vatsanābha as a group or at least were aware of this sort of co-relation between the Sarnga, and the Vatsanābha, but Pit.'s description may lead us to take Śṛngī as a variety of Vatsanābha available in the Himalayas.

Though the description of the Śārṅga poison given by the Dh. writers is sufficiently clear, it has been wrongly identified by some scholars.

Regarding the poison described in the Dharmśāstra, N.C. Senagupta observes 'the poison described is Śṛṅga (probably from some kind of horn) which does not appear to be lethal in its effect and the dosage is very small.'

Dr. Kane has following observations in his note on the Kāt. stanza 446. 'Nār. speaks of Śṛnga poison from Himalays as the poison to be given in the ordeal and Kāt. appears to be explaining it. Dr. Jolly translates Śṛnga from Śṛngī plants which is doubtful. That is said to be Śṛngaka poison which being tied to a cow's horn makes her mild red '.

In fact, the poison described by the Dh. writers is, obviously, the poison derived from the Śṛngī plant (available in Himalayas).

It is interesting to compare the details given by the Dh. writers regarding the poison to be used with those available in the Āyurveda works.

Suśruta, for example, has discussed various poisons in the second and the third chapter of Kalpasthana. The poisons are mainly divided by him into two: (i) the Sthāvara poisons and (ii) the Jangama poisons. The Sthavara poisons have ten main varieties and each of them is divided into many sub-varieties. The Kands is one of these ten varieties. It has 13 sub-varieties. Both the Sārṅga and the Vatsanābha poisons described by the Dh. writers belong to the Kands variety of the Sthāvara poisons. The Kanda poisons are very strong and are very sharp and fast in their reaction.

The Sthāvara (and the Kanda) poisons are avilable in roots or herbs, while the Jaṅgama poisons are derived from the various parts of the bodies of various animals.

It is not possible for us to accept the view expressed by N.C. Senagupta, because, as we have seen above, the Sārnga poison technically comes under Sthāvara poison (i.e. derived from some root or herb.). As regards to the Jaṅgam poisons also, we find that Suśruta has given 16 places in the bodies of animals from where the poisons can be derived e.g. jaws, nails, bones etc. but horns are not mentioned in the list. Śārṅga, therefore, cannot be the poison derived from some kind of horn.

The test of the Śārṅga poison quoted by Dr. Kane is just a fanciful explanation of the word Sṛngika available in Sāligrāmanighaṇṭu. In fact, Kātyāyana himself gives a confirmatory test of the Sārnga poison i.e. it clots the blood and turns it dark, which is rather realistic.

The Dh. writers have asked us to avoid spoiled (Bhagna), artificial (Kṛtrima), old (Jīrṇa) or processed (Cārita) poisons. It will appear that the Dh. writers were extremely realistic in putting these conditions.

Vāgbhaṭa says that the artificial poison is different from the Sthāvara and the Jaṅgama poisons. It is known as 'gara' and is prepared by mixing various medicines. Sometimes it brings instant death and sometimes it delays and prolongs the dying process. Suśruta also says that the artificial poison brings instant death (so do the Sthāvara and Jangama poisons also), but important point is that it cannot be taken out completely from the body, and is thus dangerous to the body, giving rise to many diseases which happen to be incurable.

In the poison ordeal, we find that the effects or the reactions of the poison decide the guilt or innocence of the person. It is therefore required to be consistent and definite in its results. Secondly, the poison tried must give its verdict instantly. It should not prove harmful to the health of the person in general. We have seen that the Krtrima visa cannot be extracted completely from the body. It is therefore regarded to be unfit for the purpose.

The spoiled, old and the processed poisons are technically known as Dūṣiviṣa (spoiled poisons) in the Ayurveda works. The spoiled poison is very old or processed by mixing many poison-killing medicines or dried up by fire, wind or sun-heat, or it is the poison in which its natural qualities are not preserved. This poison grows very mild and slow,

affecting the constitution of the body. It cannot be easily detected in the body. The spoiled, old and processed poisons are, therefore, also unfit.

It has been pointed out by the Dh. writers, that the poison must be given after mixing it with thirty times of ghee. In this connection again, we find that ghee is considered to be the best remedy for the poison. Ghee is unconquerable by the poison, says Vāgbhata. There is no medicine like ghee for any kind or of any condition of poison, he points out.

(ii) Watching the results:

The innocent person should be able to digest the poison without any reaction as such. According to Nār. the results become evident only at the end of the day, but if the poison reacts fast and the person is sinking, there could be a waiting period of 500 claps only. After this, immediate help should be rushed to the person.

In this connection, we find that the commentators and the digest-writers have discussed the way in which the poison reacts. 'The reaction of the poison means transferring swiftly in the body, the effects of poison from one supporting structure (Dhātu) to the other. There are seven such structure in the body. They are skin (Tvak), Blood (Asṛk), Flesh (Mānsa), Fat(meda), Bones(Asthi), Marrow (Majjā) and Vitality (Śukra.). Accordingly, the reare seven types of reactions for the details of which the Mit. asks us to refer to a work called Viṣatantra. Aparārka explains these reactions as follows : The poison reacts on the skin by causing horripilation; reaching the blood, it causes perspiration and drying up of the mouth; in flesh, it makes the person colourless and wane; in fat; it makes the person tremble, in bones; it causes the weakness of sight; in the marrow, it causes swooning and loss of senses, and when it reaches vitality it causes death.

Vāgbhaṭa describes the process shortly as follows : The poison entering the body first spoils the blood, then it disturbs the three Doṣas-Kapha (Phlegma), Pitta (Bile) aṇd Vāta (Wind) alongwith their Āśayas, then it affects the heart and leads to the death.

Thus we find that the commentators have explained the reaction of the poison which goes well with the description in the Āyurveda works. These explanations naturally help in bringing accuracy in the trial.

Br. and Pit. say that the person should be properly examined before he undergoes the trial to see that he has not used any mantra, medicine or precious stone as an antiodote against the effects of poison.

In this respect also, we must point out that the Āyurveda authorities do not dismiss the idea of mantras being used as antidotes.

NMS refers to one important point regarding the poison ordeal which has a legal significance. The accused person must be informed or rather made aware of the poison-taking, and he should ask for the poison (with full knowledge of its effects).

In fact, the Kośa should have been included in the list of oaths, because the result in it is not declared soon after the trial; but owing to its great psychological value, it is not only included in the major ordeals, but is given a wide scope for application, waiving some of the basic requirements. The major ordeals are used under grave charges, but the Kośa is not limited to these only. It could be used in the cases where the person is accused of vengeance (Sāvaṣṭambha) or in the law-suits based on suspicious .

As it has been pointed out above, the Kośa is given a wide scope for application. There is no season-restriction for the use of Kośa. It could be used at all the times. The Kośa should be used in the former part of the day, but according to NMS it could be tried even mid-day.

NMS holds that the Kośa should not be given to a Sūdra , but barring this exclusive remark we find that all other writers have clearly pointed out that Kośa could be used for a person of any caste.

The Kośa is denied in the following cases : (1) A person who has committed many offences. (2) a person who does not believe in religion. (3) a person who is ungrateful. (4) an impotent or a vile, (5) an atheist, (6) an outcast, (7) a slave, (8) a person who is addicted to wine or woman.

According to Nār., the Kośa should not be forced on anybody. It should be resorted to for the persons who believe in its efficacy and are willing to undergo it. It is particularly recommended for a Saśūka and a person free from all addictions. Saśūka, according to Mit. is one who believes in God, while VP explains it as a person who believes that the ordeal is bound to bring adverse effects if undergone wrongfully.

The Kośa has thus its own limitations. From the trial point of view, it is the most harmless ordeal which in fact does not involve any physical test as such, but psychologically it could influence the person and be useful for the persons who believe in its efficacy. Nār. has made this point clear in recommending it for Saśūka and Sraddadhana.

PROCEDURE

VIṢṆU

Having worshipped stern deities, the water in which these deities are bathed should be brought (to the place of ordeal). The accused person should drink three handfuls of water in which these deities are bathed. Facing god, he should declare that he has not committed a particular act. He who faces some disease, fire, death of some relative or Royal punishment is guilty, otherwise, he is innocent. The religious king should felicitate the innocent person.

YĀJÑAVALKYA

Having worshipped the stern deities, the water in which these deities are bathed

should be brought (to the place or ordeal) The accused person should be warned (that it is not the ordinary water meant for quenching thirst) and asked to drink three handfuls of the water. He, who does not face any severe royal or other unfortunate calamity within a period of fourteen days, is undoubtedly innocent.

NĀRADA

Now I will tell the best procedure of the Kośa, as it has been described by the knowers of the Śāstra so that, it may not be against (the conventions of) all times. The Kośa is tried upon a Saśūka, an unaddicted person, who believes in it, and is willing to undergo the trial. He should present himself before gods and brahmins with wet clothes on, after having observed fast on the previous day and taken bath for the purpose. The deity worshipped and believed by the accused person should be offered adorations and the accused person should be asked to drink three handfuls of water in which that deity is bathed.

The person who experiences some disease, fire, death of some relative, loss of desired object (Arthabhramśa) or the loss of property or any other major inauspicious happening (Pratyātmikam) within a period of a week or two, that should be considered to be the sign of his guilt, but if he experiences even greater adversities after a fortnight, he is not to be accused by the learned judges, since the person has crossed the declared period.

Having asked the accused person to stand in a circle facing the Sun, he should be asked to drink three handfuls of water. Having bathed the deity in the water, it should be given to the accused person only after making him hear (i.e. warning him) of his guilts or charges. The ill-minded mischief-monger who willingly undertakes the Kośa and prefers to tell lie out of greed would be suffering from colic. The person who contradicts or tells lie according to his whims and undertakes the Kosa (for his purpose) would be poor, diseased or lunatic for seven births (to come). The person (i.e. the plaintiff) who tries to gain his purpose by asking the accused person to undergo the Kośa under force, will ruin himself and will never succeed in his undertaking.

According to NMS, fòllowing stanza are addressed to the deity of the ordeal: "Oh Lord of Waters! you are the holding of the life of the world, the movable and the immovable! Oh! God! this person wants to acquit himself according to Dharma. Since the Fire is born out of water, it is particularly appropriate to examine him (i.e. accused person) in the waters and, therefore, Oh God! Lord of waters! it will be worthy of you to protect him by truth".

BṚHASPATI

The accused person should be kept under watch of the persons in authority for three or five days just to detect the deceipt (Kuhaka), if any. If the accused does not meet with any calamity relating to his son, wife or wealth within a week or two, he should undoubtedly be considered as innocent.

KĀTYĀYANA

For a lighter offence, the accused person should be asked to drink the water in which the weapons of gods are bathed and if he suffers on that account, he should be taken as guilty, but innocent, if reverse is the case.

The person, who gets his jaw or chin injured and bleeding or limbs shivering, should be declared guilty. If due to the nor-correspondence of fate, he suffers the miseries within a period of three weeks, he should be asked to pay the money (equal to the value of the offence) and face punishment. Of course, if disease, fire, death of a relative or heavy debts experienced by the person are solely relating to that individual and not of general nature (such as epidemic) belonging to all, he must be asked to pay fine, but if he suffers from high fever, dysentery, tumor, aching in the inner bones, disease of eyes or throat, insanity, headache, fracture in arms—these are the disease (due to the divine intervention) .

PITĀMAHA

Now, I will tell an all-time (Sanātanam) method of Kośa ordeal and the cases in which it can be used. The (accused) person must be asked to drink the water in which is bathed the deity of which he is a worshipper. If he has an equal faith in all the deities, the water in which god Sun is bathed must be given. In the case of Durgā, it is her spike that is to be bathed, the orb in the case of Sun, and their respective weapons in the cases of other gods. The water of the bath of Durgā is to be offered as ordeal to the thieves and those who live by the profession of arms, while the water of the bath of God sun is not to be given to the Brahmins. The Kośa can be used in all cases of doubt as well as for declaring one's faith in all acts of collaboration, while it can always be used for declaring the purity of mind. The Kośa must be administered in the former part of the day, to an unaddicted person, believing in the efficiency of the trial, and who having observed fast and taken bath thus presents himself with wet clothes on. The person who is purified in the said manner by bathing and presenting himself with wet clothes on, should be asked to drink three handfuls of water, facing east. The person, who gets adversities within three, seven, ten or fourteen days is supposed to be the guilty person, but if such calamities are belonging to all persons (i.e. if they are of general nature) and not belonging him individually, such calamities cannot prove his guilt. If he faces disease, fire, death of some relative, that is a sign of his guilt.

HĀRITA

The accused person must be asked to drink the Kosa on the ground that is besmeared with cow-dung.

Vyavahāra

The important account given by Bhīṣma of the nature and purpose of Daṇḍa (Punishment) incidentally produces an Indian counterpart to the Roman just *naturale*, the full implications of which deserve investigation elsewhere. Amongst the details we find a description of *Daṇḍa* as follows:-

nīlotpala-dala-śyāmaś=caturdaṃṣṭraś=caturbhujaḥ
aṣṭapān=naikanayanaś=śankukarṇōrdnvarōmavān
jaṭī dvi-jihas tāmrāsyō mṛgo-rāja-tanucchadaḥ
ētad-rūpam bibharty=ugram Daṇḍō nityaṃ durāvarah.

Because it is awe-inspiring, yet systematic, its qualities capable of classification, Bhiṣma finds it convenient to personify *Daṇḍa*, which he later exalts as a divinely instituted means whereby Kings may preserve their position and thereby the 'everlasting order' which human life, amongst other kinds of existence, was supposed to exemplify. The metaphor is not expounded, and we are forced to turn for an explanation to the commentaries, of which Dr. Belvalkar gives a brief account. From the end of his summary it appears that whereas Arjunamisra in his *Bhāratārtha-dīpikā* and Nīlakaṇṭha in his *Bhārat-bhāva-dīpia* pretty generally agree as to the meaning of the passage, Vimalabodha in his *Durghaṭārthaprakāśini* quotes a 'somewhat different interpretation' by Bhāja-dēva as given in his *Vyavahāra-mañjarī*. This reference is of the greatest importance as, though it has been known for a long time that the polymath Bhōja, King of Dhārā, was devoted to the study of the Dharmaśāstra among other Sastras, and made numerous original contributions to it, the name of his chief legal work was not known until this discovery from Vimalabōdha. Moreover, whereas a close consideration of this riddle-like text is not out of place in a commentary on the *Mahābhārata* itself, it is curious that a practical mind such as Bhōja's should have found it worth while to expend time and energy on what seems a laudatory fantasy. Bhōja, who preceded Vijnanesvara by not more than half a century (he lived between A.D. 1000 and 1055), can hardly have taken pains to interpret this passage, which not only Vijñānēśvara but his illustrious predecessors Asahāya, Medhātithi, Bhavaswāmi and Viśvarūpa, and all his successors, with one exception, ignore, unless he had some special object in view.

The present writer has not inspected the text of Vimalabōdha's work, but a copy of a fragment of a work on judicial administration, *Vyavahāra-vidhāna*, recently obtained from the Sarasvati Mahal Library at Tanjore shows that its anonymous author found it necessary to copy, or virtually to copy, Vimalabodha's treatment of the point, and from the fragment it is possible to reconstruct Bhōja's attitude to this curious passage. In the first place Bhōja cut down the quotation from the *Sāntiparva* to one and a half-*ślōkas*, so that the half-*sloka* which applies the description to Daṇḍa is omitted, leaving it open to him to apply the words to *Vyavahra*. This is not so unwarranted as it might seem, for Bhisma's speech makes it clear that Vyovahara, in the wide sense of 'order' or ' world-

plan' comes down to earth, as it were, so as to coalesce at one point with *Daṇḍa.*

This occurs when a case comes up before the King and it becomes possible that a penalty must be awarded against one of the parties, the decision depending not upon the self-evident text of the Vēda or of the *Smṛti* as a Vēda-inspired authority, but upon the interpretative faculty of the ruler. This class of Daṇḍa he calls *bhrtṛ-pratyaya-lakṣana.* This expression Dr. Belvalkar would translate, ' characterized by its dependence upon evidence produced by the parties', giving bhartr the meaning 'litigant'. It seems, rather, that the author of that portion of the Mahabharata viewed the King in his Court as dispensing a justice which, though depending upon the ultimate, superior Vyavahara, in practice amounted to a personal responsibility, in which the parties must have confidence if Danda in its civil and criminal contexts was to have its proper effect. Thus both Danda and Vyavahara could be, as Bhisma says in slokas 48.50, and 56, *bhartṛ-pratyaya-lakṣana,* and to that extent the two amounted to the same thing. But could this conception affect the actual administration of justice? Bhōja-deva evidently though that it could, and he was followed in this notion not only by Vimalabodha, who may not have been a lawyer, but also by the author of the *Vyavahāra-vidhāna* who sought to satisfy an 18th-century ruler of Tanjore, a member of a family that took its judicial responsibilities very seriously A glance at the parallel interpretations of the *sārdha-ślōka* will make the reason apparent.

'Dark like the petal of a blue lotus'(?)- Arjunamiśra and T (the Tanjore MS.): black and white because of the manifestation of truth and falsehood on the part of the plaintiff and defendant; Bhōja: Vyavahara is a contradiction between the plaintiff and defendant who are both manifesting truth and falsehood, and he (i.e. *Vyavahāra*) is a person partaking of both character on account of his comprehending the dharmas of both of them. The expression *'nilōtpala-dala-syāmaḥ'* signifies properly one whose character is part black and part white (like the Ganges and Jamna at Prayāga), because (here) both parties manifest truth and falsehood.

'Of four tusks'— Nilakantha : the modes of punishment (rebuke, fine, mutilation, putting to death). T : the four knowers of the Veda and Dharma, for they are the means by which lawlessness is put down: reference to Yājñavalkya i, 9. Bhoja : no comment.

'Of four arms'— Arjunamiśra and T: he enjoys and protects the four castes and four āśramas, because without *Vyavahāra* the result would be chaos. Nīlakantha : four arms with which to take four kinds of revenue (this clearly applies only to *Daṇḍa).* Bhōja: (probably, as what follows must be transposed from after *ubhayor nayanani yasmin* to before tathobhayos=catvarah padah) because of the four syllables in *vya-va-ha-ra:* reference to the text *caturaksara tu nivrtta.*

'Of eight feet'-(Here we might have expected either a reproduction of Narada i, 10, on the bases of Law, or a reference to the *vyavahara-padas,* or subdivision of litigation.) T's point of view does not square with that referred to by Dr. Belvalkar nor with that of *Nilakaṇṭha:* the eight feet consist of the four defences (equivalent to the English denial,

admission, confession and avoidance and *res judicata*), where Nilakaṇṭha suggests the eight possible elements of a lawsuits, plus the two methods of investigation, human and divine, and the decision—here one *pāda* seems to be omitted. Bhoja: the four feet of the parties themselves(!) *plus* the group of four consisting of plaint, reply and settlement of burden of proof (which generally involves the decision itself with it).

'Of many eyes'—Arjunamiśra, Vimalabōdha, and T : means of proof (capable to leading to a decision) consisting of documents, witnesses and possession. Nilakaṇṭha: the eyes consist of the King, his ministers and priests, and the Court, Bhōja: the many eyes of the parties.

" *Of pointed ears'*—Arjunamiśra: the ears are anger and greed. T: the two firm ears signify the *Dharmaśāstra* and the *arthaśāstra* which must be used to guide the *Vyavahāra* along: reference to Nārada i, 31/38. Bhōja : he has spear-like ears consisting of obstinate anger and greed (on the part of the parties, scil.).

'Of matted top-knot'—Nilakaṇṭha: having a multitude of involved uncertainties (in the trial); T says, *nānā ūhakādijatā-yuktaḥ*, 'having a topknot consisting of various analogies, or deductions'. Bhoja says laconically, *'jaṭī: dṛḍhamūla'*, i.e. the word means root, not tap-knot, as it usually does, as *Vyavahāra* is an obstinate, tough affairs, almost impossible to eradicate once it has been commenced.

'Of two tongues'— T says that the two tongues belong to the plaintiff and defendant *jaya-parājaya-phalāsvādike*, 'savouring the fruits consisting of victory and defeat'. Bhōja does not comment and he apparently follows the obvious view that the two tongues represent the two parties at the Bar.

'Of brazen visage'— Arjunamiśra takes this to be the material of which the face is composed, representing the wager in coins which the litigants were at times compelled to put down before the trial commenced, that of the loser being forfeited to the Crown. T follows this. Bhōja: the eyes of the two parties are reddened in colour through anger.

Finally, *mṛga-rāja-tanucchadaḥ*—Arjunamiśra: wrapped in a tiger-skin; Nilakaṇṭha: wrapped in deer-hide; T : having a tiger-skin as a covering, that is to say, being of variegated appearance, such as the foregoing suggests. Bhōja : *upaveśanārtham... vyāghrasya...carma-puṭaṃ yasmin sa tathā*, 'having a fold, or pouch, of tiger-skin to sit on ', in support of which interpretation he quotes a hitherto unknown *ślōka* from the Bṛhan-Nāradīya [*sic*], of which the meaning is that a litigant who hopes to win a lawsuit should provide himself with a tiger-skin to sit on, should concentrate on Viṣṇu, should have a piece of gold in his hand (as a talisman, presumably, not as a bribe for the judge or a sign of willingness to pay damages), and a smile on his face (to indicate absence of malice). This strange advice is not quoted in the principal digest (the publication of Lakṣmīdhara on *Vyavahāra* is awaited) and is interesting as tending to prove that there was a *Bṛhan-Nārada-Smṛti*, which has long been doubted.

That view of the nature and function of *Vyavahāra* was ancient and persistent is proved

by the fact that the defeated litigant was always fined; by the fact that of the King's duties, *duṣṭa-nigraha-śiṣṭa-pratipālana*, repression conventionally comes first; by the statement in the *Mitākṣarā* (on Yājñ. i.360) that the King should attend to judicial business *duṣṭāduṣṭa-parijñanārtham*, where the choice of words is significant; and by the survival in the *Sarasvati-vilāsa* (c. 1520) of the view that one of the principal ends of *Vyavahāra* is repression of the wicked: *duṣṭa-parijñānaṃ vyavahāra-darśanamantareṇa na siddhyati.* It is essentially a tendentious view, inseparable from a particular philosophical approach to Society. Its effect on legal practice could be pernicious. In a fair number of disputes both parties are more or less in the wrong, and the application of the science of jurisprudence according to the prevailing system of the country and period merely obliges the complainant to formulate his complaint and detects whether he is or is not entitled to a particular remedy, and though the position is complicated in modern times by the existence of pleas of the Crown, which were impossible in ancient India, it was never practicable, whether in India or elsewhere, to view litigation as an organ of State policy. A judicial organization which saw litigants as prospective criminals, and litigation as a source of income for the Crown, suffered from an initial bias that must have been fatal to justice. None of the digest-writers views *Vyavahāra* in the same light as the author of the *Śāntiparva*, and it seems that we may owe this as much to the effort of Bhōja-déva as to the effect of practical experience. The text could not be perpetually ignored, for the theory of *eka-vakyata* did not permit of inconsistency even on the part of the epics with the *Smṛti*. Hence Bhōja explains that while the others personify *Vyavahāra* as an organ of the State, as it were a tool of the King, not connected by nature with the actual origins of litigation and standing apart from the parties, he himself saw it as the duel itself personified. *Vyavahāra* to him was the essence of all legal battles, made up of the passion of the all-too-human adversaries, sprinkled with the dust of the forum itself. Accordingly it was not only a mere everyday phenomenon, but also one capable of rationalization and progressive analysis.

The authore of T concludes his summary with the words:-

ayaṃ pakṣo bahubhir Dhārēśvarādibhir nibandhibhiḥ anumata iti yatheṣṭaṃ vyavahartavyam.

This was no ' academic ' matter. If his royal patron cared to follow the view which had the approval of many digest-writers commencing with the King of Dhāra, it was open to him to arrange his judicial administration accordingly. Most modern lawyers will agree with Bhōja.

VYĀGHRA-SMRTI

The contribution of Vyāghra to some of the concepts and aspects of the Dharma-Sāstra and the arrangement that is assigned to some of his stanzas in the later Dharma-Sāstra literature by the commentators of the Smṛtis and digest authors. In the Dharma-Śāstra

literature, it is a well-known fact that a Sūdra is not entitled to have any right to perform the Śrāddha ceremony of his dead ancestors. MM. Dr. P.V. Kane in his History of Dharma-Śāstra Vol. IV, p. 365, has quoted the text of the Smṛtyarthasāra to show that a Śūdra should get the Sraddha performed through a priest or priests or they may perform it for him without uttering manrtras. The Vyāghra Smrti on the other hand allows a person from a Śūdra community to perform a Śrāddha without having a Tilak mark on the forehead. If, however, he applies a Tilak mark on the forehead, his dead ancestors get disappointed and this kind of Śraddha does not bring him any glorious fruit as such. Moreover, this kind of Śrāddha is not received by the dead ancestors. Now the question arises as to what kind of Śūdra is qualified to perform a Śrāddha according to Vyāghra. This question is solved by Devaṇṇabhaṭṭa in his Smṛti-Candrikā. Śrāddha Kānda, by quoting a stanza in the name of Vyāghra. This stanza simply means that a Śūdra who is born as a result of the union of a Brahmin husband and a consecrated Śūdra wife and who is more engaged in his own work is regarded as a good Sudra or a competent Śūdra, in the opinion of Vyāghra, to perform a Srāddha ceremony. The stanza quoted by the author of the *Smṛti-Candrika* is also found in the *Smṛtimuktāphalam*, Śrāddhakāṇḍa Page 67. From this, it goes without saying that in the vast Dharma-Śāstra literature, Vyāghra has expressed a revolutionary view allowing a particular Śūdra to perform a Śrāddha without a Tilak mark.

Vyāghra also appears to have attached supreme importance to the custom which is even today recognised as a valid source of Hindu law even during the British regime and even after the dawn of independence. Vyāghra, for example, points out that in some parts of India like Aṅga, Vaṅga, Kaliṅga, Tailaṅga, and Dravida, there is no practice of applying a Tilak mark on the forehead. Vyāghra has further emphasised the importance of a Tilak mark on the forehead for all the matters pertaining to Śrāddha, Ācamana, Sandhyakarma and others. In the *History of Dharma-Sāstra*, Vol. II, Part I, pp. 585, 672-675, Dr. Kane has not mentioned this peculiar custom of not applying a Tilak mark on the forehead. in the article on 'Tilak Mark' contributed to *Ṛṣi-Kalpanyāsa—Paṇḍita Rājeshvarashāstri Dravid felicitation volume*, he remarks that the application of a Tilak mark on the forehead of the ladies does not appear to be obligatory on them. It is difficult to agree with the learned Doctor on this point. Once can quote here the stanza from the *Vyāghra Smṛti* which clearly means that a Brahmin without a Tilak mark on his forehead and a pious lady without having the Tilak mark of saffron on her forehead—these two things are condemned among the people and particularly in respect of the matters pertaining to *daiva* and *pitrya*.

Vyāghra's original contribution to the correct understanding of the concept of the term 'Svayampāka' in the field of Dharma-Sāstra is really supreme. Vyāghra, for example, explains it by saying that when the food for the Srāddha ceremony is cooked either by the Yājamāna himself or by his wife or by his son, then that cooked food is called as Svayaṁpāka. He further indicates that the food prepared by the Yājamana himself is pure and possibly the preference is to be given to it over the food prepared by other

members of the family i.e., by his wife or by a son. In the *Yājñavalkya-Smṛti* and even in the *Manu-Smṛti*, this concept of Svayampāka is not clarified to the readers. Hence the importance of the *Vyāghra Smṛti* can hardly be denied in correctly understanding this concept. Vyāghra has also given a warning in respect of the food not to be cooked by some members of the family. Vyāghra, for example, points out that the food for the Śrāddha ceremony is not to be cooked by a daughter, a widow, a childless woman, a pregnant woman and a woman with bad appearance. The gods and dead ancestors are not satisfied by the food that is cooked by these members so specified by Vyāghra. It may be significantly pointed out that in the ancient *Smṛti* works, we do not have any information regarding the food not to be cooked by some members of the family-particularly for the Śrāddha ceremony. Hence this significant aspect of the *Vyāghra Smṛti* in respect of Svayaṁpāka and the persons disqualified for cooking the Śrāddha food can hardly be ignored. In passing, it may be added that even in the *History of Dharma-Sāstra*, MM. Dr. P.V. Kane has not touched this aspect.

The question often arises in respect of the Śrāddha of a person whose death anniversary is not known. In this respect, Vyāghra has an original view to offer. He points out that when the death anniversary of a person is not known, one may perform the Srāddha of a person on the eleventh day of the black fortnight of that month. The view point of Marici quoted by Devannabhatta in his *Smrti-Candrikā* Srāddha-kāṇḍā comes very near to the view point of Vyāghra, though the difference in the language of both of them is always to be taken for granted.

The signal contribution of Vyāghra to the revolutionary aspect of Atideśa i.e., a rule of Transfer should be appreciated. Generally it is agreed that when the details of the Prakrti are transferred to the Vikṛti, some kind of deduction takes place in respect of the details. Vaidyanatha Diksita (1650-1700 A.D.), the author of the digest *Smṛtimuktāpalam* has quoted a stanza in the name of Vyāghara which means that when the details in respect of a Vrata in a Prakrti are transferred to the Vikṛti, the details become less by one-fourth of the original. In other word, in the opinion of Vyāghra, only the three-fourth of the details are transferred from the Prakṛti to the Vikrti Nilakaṇṭha (1600-1660 A.D.) has pointed out the three varieties of Atidesa such as Sāmya, Tādrūpya and Vacanika. He has also suggested the rates of deduction for these varieties. For Sāmya Atideśa, he suggests the deduction of one-half of the details of the Prakṛti to the Vikṛti. In the case of Tādrūpya and Vācanika varieties of Atideśa, however, Nilakaṇṭha suggests that the details from the Prakṛti to the Vikṛti become less by one-fourth of the original *i.e.*, the Prakṛti. Nilakaṇṭha's varieties of Tādrūpya and Vācanika Atidesa come very near to the view point of Vyāghra quoted by the author of the *Smṛtimuktāphalam*. From this discussion, it would be quite evident that Vyāghra has contributed to the evolutionary aspect of Atideśa particularly in the matter of deduction of the details from the Prakṛti to the Vikṛti. Nilakaṇṭha has not quoted the text of Vyāghra referred to or quoted in the *Smrtimuktāphalam*.

Some of the epigrams of Vyāghra can be traced elsewhere. Two stanzas of Vyāghra

could be traced in the digest authors as ascribed to some other authors e g. '*Akale kurute karmakale prāpte na karayet/ kalatitam tu yatkarma akrtam tam vinirdiset//*as No. 161 of my critical edition is found with slight variations quoted in the *Smṛticandrika*, Ahnika, Kanda p. 427 as ascribed to Pulastya. Another stanza No. 203 '*Gururagnirdvijatinam* etc. from the *Vyāghra Smrti* is found with slight variations in the *Auśanasa Smrti* p. 505 (The collection of the *Smrti*s by Jivananda Vidyasagara published in 1876). However, the stanza No. 358 from the *Vyāghra Smrti*s is not found anywhere quoted in the collection of the *Smrti* works so far published. The importance of the Vyaghra *Smrti* even from the angle of epigrams has to be appreciated.

The *Vyāghra Smṛti* is important even from the point of view of Interpretation. The *Vyāghra Smṛti* has served the purpose of the commentator Maskari on the *Gautama Dharma-Sūtra (GDS.)* He, has made profuse use of the *Vyāghra Smrti* in interpreting the text of GDS. Maskari quotes the text of Vyāghra to explain the significance of the word can in GDS 23.12 (p. 318), to explain the varieties of Sraddha on the GDS 11.9 (p. 179), material and country for the Srāddha on the GDS 15.4 (p. 249), explations for woman leading an immoral life on the GDS 22.8 (p.355), expiation for a man leading an immoral life on the GDS 22.13 (pp. 359-360). All these references from the commentary of Maskari on the GDS clearly indicate the utility of Vyāghra from a different angle. These references further indicate that Vyāghra's views have become acceptable to the commentators of the Sūtra literature.

It would be interesting to see whether the view expressed by Vyāghra in the field of Dharma-Sāstra has any vedic basis. Vyāghra has specifically stated that when the Gotra of a dead person is not known, one may utter the name of Kaśyapa. This view of Vyāghra is stated with approbation by most of the writers on Dharama-Sāstra. It is Devaṇṇabhaṭṭa (1150 to 1225 A.D), the author of the *Smṛticandrikā* who has quoted this view of Vyāghra and supported the same by quoting the Sruti passage. From this, one is justified in holding that the view point of Vyaghra has a Vedic basis.

A curious reader of Dharma-Sāstra would be interested in knowing the position of the *Vyāghra Smṛti* particularly when it comes in direct conflict with the view point of the ancient *Smrti*-kāras lika Manu and Yājñavalkya. Here one may quote the stanza from the *Vyāghra Smṛti* quoted in the Dharma-Sāstra literature. Here the question arises as to whether a boy in whose case the initiation ceremony has taken place is entitled to perform the Srāddha ceremony. The text of Vyāghra is quoted by Balāmbhatti in his commentary on the Prayascitta Portion of the *Mitaksara* on the *Yājñavalkya-Smṛti* to show that a boy in whose case the initiation ceremony or thread ceremony has taken place can perform the Srāddha ceremony and also offer water in the honour of his dead ancestors. This view of Vyāghra comes in direct conflict with the *Manu-Smṛti* II.171-172 which allows a boy in whose case the thread ceremony has not taken place to perform the Srāddha ceremony. In such a doubtful case, Bālambhaṭṭi (1730-1834 A.D.) decides that the text of Vyāghra is to be set aside and preference is to be shown to the text of the *Manu-Smṛti*. In other words, when the view point of Vyāghra comes in direct conflict with *Manu-Smṛti*

Bālambhatti rejects the view point of Vyāghra. Here one may point out that Vaidyanatha Diksita in his *Smṛtimuktaphalam* quotes the view point of Devaṇṇabhatta, the author of the *Smrticandrika*, who holds that in such a case of conflict, one may resort to opinion.

It would be equally interesting to know the arrangement that is assigned to the text of Vyāghra in the vast Dharma Sastra literature. Here one may quote a stanza on the name of Vyāghra from the Suddhi aspect of Dharma-Sāstra. This stanza is found quoted by Maskari in his comments on the GDS 14 28p. 238. This stanza means that if a person of the lower caste carries the corpse of the person belonging to a higher caste or a person belonging to a higher caste carries the corpose of a person belonging to a lower caste with a seen or visible motive, then his impurity gets doubled. He has to observe impurity for a period which will have to be double in comparison with the ordinary period of impurity. Now it would be interesting to see how this stanza of Vyāghra is looked at by the writers on Dharma-Sastra. (1) Haradatta in his comment on the Gautama Dharma-Sūtra remarks that this stanza refers to the carrying of the corpse of a servant by a person belong to a higher caste. (2) Vaidyanātha Dikṣita in his *Smrtimuktaphalam* Āśauca kaṇḍa states that this stanza refers to the occasion when there is no difficulty either for a lower caste or for a person of a higher caste. (3) Maskari on the GDS 14.28 states that if the act is done either by a person of a lower caste or by a higher caste with some visible motive, then only the impurity gets doubled. He does not explain the term 'visible motive.' Is it likely that carrying of the corpse by accepting some money prohibited in the present context? (4) Nandsapaṇḍita in his Suddhincandrikā (1580-1630 A.D.) on Asdasiti remarks that if a person of a higher caste or a lower one takes wages for carrying the corpse, then only the period of impurity will be doubled. (5) Bālambhatti on the Prāyścitta portion of the Mitaksara on the Yājñavalkya-Smṛti observes that this stanza has no reference to the greedy nature, but it refers to a servant belonging to a lower caste. All these references from the commentators and digest authors are sufficient to establish my standpoint that in assigning arrangement to the text of Vyāghra, there appears to be a difference of opinion among the writers on Dharam-Sāstra.

The utility of the text of Vyāghra can hardly be denied in correcting the mistake on the part the learned authority on Dharma-Sāstra like MM. Dr. P.V.Kane. In respect of sipping the water at the time of Sandhyavandan, the learned Doctor observes that the practice of uttering names of Viṣṇu at the time of Sandhyāvandana appears to be a modern one and particularly practised in the Deccan part of India. Further, this practice is not at all advocated by any Smṛtikara or a commentator. These remarks of the learned Doctor are serious and cannot be accepted without challenge. Here it may be respectfully submitted that Vyāghra has laid down the practice of uttering 24 names of Viṣṇu along with the nyasas to be followed. The probable date of the Vyāghra Smṛti falls in the 10the century A.D. Moreover, this text of Vyāghra is also quoted by Bālambhaṭṭi on the Acara portion of the *Mitaksara* on the Yājñavalkya-Smṛti. The verses on the name of Vyāghra are quoted by Bālambhaṭṭi from the Prayogaparijata. In addition to this, he also quotes from Agastisamhita, Gautamatantra and Rāmārcana-candrikā in support of this practice

of uttering 24 names of Viṣṇu. Besides, one should note that Bālaṁbhaṭṭi belongs to the northern part of India and is written in the latter part of the 18th century A.D. and the former part of the 19th century A.D. The text of Bālambhatti is published by Mr. J.R. Gharpure in A.D. 1914 and Dr. Kane has consulted this book. One may say here that 'Even Homer sometimes nods.'

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This Dictionary has been compiled by a leading Hindu spiritual teacher and eminent vedic scholar *Swami Parmeshwaranand* of Haridwar (U.P.). He has written several books on Hindu religion and translated many important religious scriptures into English. He has also conducted several seminars, and work shops where many reputed theologists from all over the world took participation.

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